Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-5602

FEODOR FEDORENKO,
Petitioner

Vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Feodor Fedorenko petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit, which reversed and remanded a judgment of the United States District Court for the Southern District of Florida, which entered judgment for the Petitioner in an action commenced by the United States of America to revoke the petitioner's naturalization.

OPINION BELOW

The opinion below is reported in 597 F.2d 946, and also appears as Exhibit B in the Appendix to this petition. The opinion of the District Court appears as Exhibit A.

The United States Court of Appeals, Fifth Circuit, reversed and on remand directed the District Court to enter judgment for

the United States, and to cancel the Petitioner's Certificate of Naturalization.

JURISDICTION

The Judgment below was entered June 28, 1979 (Exhibit B) Rehearing En Banc was denied August 15, 1979. Jurisdiction of this Court exists under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether proof of Materiality as required under 8 U.S.C. §1451 (a) and as set forth in *Chaunt* v. *United States,* 364 U.S. 350, 81S. Ct. 147 requires under the second standard that the Government must prove the existence of ultimate facts which would have warranted denial of citizenship and that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts.

2. Whether under Chaunt, the Petitioner's failure to disclose his presence during World War II, at the Treblinka Concentration Camp was a fact if known, that was sufficient to divest him of his citizenship.

3. Whether the United States District Courts have equitable powers to consider equitable and mitigating circumstances in a denaturalization proceeding as a basis for its holding and decision to deny denaturalization.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act, of 1952, as amended (Act), 8 U.S.C. 1451(a), provided in part, as follows:

> "It shall be the duty of the United States Attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any Court specified in subsection (a) of Section 310 of

this title (Sec. 1421 of 8 U.S.C.) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation..."

STATEMENT OF THE CASE

Petitioner was born in the Ukraine in 1907. On June 23, 1941, he was mobilized into the Russian Army along with the truck he drove for the State. Within three weeks of the date of mobilization, he was captured by the German Army, Appendix B8, 9. After his capture he was transported from the Ukraine first to Zytomer, then to Rovno in the Ukraine, then to Chelm, Travnicki, Lublin, Warsaw, Treblinka, back to Travnicki, Poland then to Poelitz and to Hamburg, Germany, all during the period of 1941 to 1945. Appendix B. Through most of this time period the Petitioner was forced to act as a guard under the direction and control of the German Army. (Appendix 39a).

At the end of the World War II, the Petitioner worked for British Occupation Forces from 1945 to 1949. Appendix B32. When the Petitioner registered with the British he listed his birthplace as Sarny, Poland, and his nationality Polish-Ukrainian to avoid forced repatriation to the Soviet Union. (Appendix 32a, 33a).

While at the displaced persons camp at Osdorf near Hamburg, the Petitioner applied for immigration to the United States. He stated his birthplace was Sarny, Poland, his occupation farmer until March 1942, when he was deported to Germany to work at Poelitz. (Appendix 33a).

The Petitioner's application for a visa was executed on October 12, 1949, by United States Vice-Consul Ralph G. Clark at Wentorf near Hamburg. (Exhibit E). Thereafter, the Petitioner arrived in the United States at Boston, Massachusetts on November 5, 1949.

On November 21, 1950, the Petitioner executed an Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention, wherein he declared he was born in Sivash, Ukraine. (Exhibit F).

Thereafter, the Petitioner applied for Naturalization on October 4, 1969, and on April 23, 1970 he was issued a Certificate of Naturalization. (Exhibits G and H).

On August 15, 1977, the United States Government commenced denaturalization proceedings against the Petitioner under 8 United States Code 1451(a).

The complaint alleged in Count 1 that the petitioner gave false information in his application for Immigration Visa as to his birthplace and places of residence.

Count 2 alleges the Petitioner committed crimes or atrocities against civilians at Treblinka Concentration Camp in Poland, and he was therefore not a displaced person under the Displaced Person Act and not eligible for immigration to the United States.

Count 4 alleges the Petitioner wilfully failed to disclose the commission of crimes at Treblinka in response to question #6 on Form N-400.

Count 5 alleges the Petitioner wilfully failed to disclose his service as an armed guard for the Germans in response to question #7 on Form N-400.

Counts 6 and 7 allege the defendant lacked good moral character required to become a citizen by commission of atrocities at Treblinka and giving false statements with request to Questions #6 and 7 on Form N-400.

The case was tried before Judge Norman Roettger in the United States District Court, Southern District of Florida and the Court issued its decision on July 25, 1978, (Exhibit A),

United States v. *Fedorenko,* 455 F. Supp. 893 (1978). The Court found the Government did not meet its burden of proof as to all counts of the complaint. (Appendix 46a, 47a, 48a).

The District Court further found the Petitioner was a prisoner of the German Army and was forced into involuntary guard duty. (Appendix 11a, 12a, 39a).

The Court did find that the Petitioner lied on his Immigration Application when he gave his birthplace as Sarny, Poland, and stated he worked in a factory in Poelitz, Germany. (Appendix 41a).

The District Court held that the misrepresentation was not material as to nationality or birthplace, and would not have denied him citizenship, (Appendix 42a), nor would the disclosure of these facts have been useful in an investigation leading to the discovery of other facts which might possibly result in a denial of citizenship. (Appendix 43a).

The Court then considered the materiality of the Petitioner's mistrepresentation of his whereabouts from 1942 to 1945. The District Court found the Petitioner's disclosure of his presence at Poelitz, whether as a forced laborer or a prisoner-guard, would or should have prompted an investigation of records into the Petitioner's background. (Appendix 43a, 46a).

The Court found the Government failed to show that an inquiry had been made in response to information which should have prompted an inquiry. (Appendix 46a).

The District Court specificially held the Petitioner lawfully entered the United States and found for the Petitioner on Counts 1, 2, 3 and 4. (Appendix 47a).

The District Court further held, the Government failed to meet its burden of proof as to Counts 6 and 7 and found the Petitioner had not wilfully deceived the Government. (Appendix 48a).

The Government's witness as to Policy and Procedures of Vice-Consul in administering the Displaced Persons Act was Kempton Jenkins, who served as Vice-Consul in Munich, Germany from March 12, 1951 for about eleven months.

The District Court weighed the testimony of Jenkins in light of the other testimony of witnesses and the Petitioner. (Appendix 35a).

The District Court found numerous inaccuracies in his testimony. (Appendix 35a). While the witness's testimony was informative as to the general procedures followed while he was in Germany, it did not establish what policies or procedures were employed at the time the Petitioner applied for his Visa in 1949.

The District Court rejected Mr. Jenkin's definition of Voluntary and found that the Petitioner did not act ina voluntary way while a prisoner under the German Army (Appendix 39a).

The Government failed to produce as a witness Vice-Consul Ralph G. Clark, who processed the Petitioner's visa, leaving in doubt many questions as to what occurred in 1949. (Appendix 46a).

The District Court's decision that the Government failed to prove that the concealed facts would have denied Fedorenko citizenship was based on a finding of the following facts:

a. Fedorenko's guard duty was involuntary; (Appendix 11a, 37a, 39a).

b. the testimony of Kempton Jenkins contained inaccuracies and was therefore considered in the light (of) all the evidence; (Appendix 35a).

c. Fedorenko lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany; (Appendix 41a).

d. the True facts of Fedorenko's birthplace and nationality would not justify denial of citizenship; (Appendix 42a) the disclosure of those facts would not have been useful in an investigation leading to discovery of other facts possibly warranting denial of citizenship; (Appendix 43a).

e. if the Treblinka term had been known to Vice-Consul processing Fedorenko's visa it would have prompted an investigation to determine if Fedorenko committed atrocities at Treblinka or served voluntarily as a guard; (Appendix 43a).

f. the government did not produce the Vice-Consul who processed Fedorenko; (Appendix 35a).

g. the Vice-Consul would have to decide whether to admit the applicant and would give the benefit of the doubt to the applicant, the tendency being to make a favorable judgment; (Appendix 36a).

h. the knowledge of Fedorenko being at Poelitz whether as a forced laborer or a prisoner-guard would have triggered an inquiry or search of records; (Appendix 43c).

i. Fedorenko did not mention Treblinka in his history to the Displaced Persons Commission, he did mention his service at Poelitz. Although the information should have triggered an inquiry, there is no mention of it; (Appendix 45a, 46a).

j. the doubt as to whether there was an inquiry as to the mention of Poelitz or whether ther would have been an inquiry as to it and Treblinka was resolved in favor of the defendant; (Appendix 46a).

k. the Court found the Government failed to prove the commission of any crime; (Appendix 46a).

l. Fedorenko had strong reason to view himself as a prisoner of war and not an armed guard for the Germans; (Appendix 47a).

m. Fedorenko's good conduct for 29 years is uncontroverted, while the evidence of his conduct at Treblinka is fraught with conflict and uncertainty and inconclusive; (Appendix 48a).

n. the Government did not meet its burden of proof as to Counts 1, 2, 3, 4, 5, 6, 7; (Appendix 46a, 47a, 48a, 54a, 55a).

o. the Equities demand that due consideration be given to Fedorenko's 29 years as a responsible citizen and the inconclusiveness of the record as to his conduct 35 years ago, and that equity requires judgment for Fedorenko. (Appendix 55a).

The Government appealed the decision of the District Court to the United States Court of Appeals, Fifth Circuit, claiming five questions of error. The Court of Appeals considered only three challenges to the lower Court ruling.

First, the Government asserted the Petitioner's own admissions indicate his naturalization resulted from material misrepresentation and concealment.

Second, it claims the District Court erred in its rejection of testimony by several survivors of Treblinka.

Third, the Government claims the District Court erred in holding equitable considerations would serve as an alternate basis for its judgment for the defendant. (Appendix 59a).

The Court of Appeals, however, did not consider the second challenge which was the District Court's rejection of the testimony of the Treblinka survivors in reversing the decision of the lower court and remanding for directed judgment on behalf of the Government. (Appendix 65a).

Thus, the Court of Appeals, Fifth Circuit, decided two questions:

1. Did the Petitioner's naturalization result from material misrepresentations and concealment; and

2. Did the District Court err in hold equitable considerations would serve as an alternative basis for judgment for the Petitioner.

The Court of Appeals first addressed, as an important question, the standard to be applied to the materiality of a misrepresentation by nondisclosures in an action for revocation of citizenship. (Appendix 58a). This Court held the District Court erred as a matter of law, and that it is necessary to prove only that facts which the Petitioner misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship. (Appendix 58a).

The Court of Appeals stated the District Court erred as a matter of law as to the standard to be applied to the materiality of a misrepresentation by nondisclosure and further erred in its alternative holding on equitable grounds. (Appendix 58a, 65a).

The Court of Appeals stated:

> "It was not necessary the the Government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might if disclosed, have led to the discovery of other facts which would have justified denial of citizenship." (Appendix 58a).

The Court of Appeals reversed the decision of the District Court and remanded that said Court revoke the Petitioner's citizenship.

The Court of Appeals based its finding on the testimony of Kempton Jenkins, and held that the Petitioner obtained his citizenship by misreprentation and concealment of his whereabouts during the war years and his service as a Concentration Camp guard. (Appendix 65a).

The Appelate Court disagreed with the District Court's findings as to the weight that should be accorded the testimony of Kempton Jenkins, and found as a fact, which is the direct basis for its decision, that the American Authorities *would* have conducted an investigation which might have resulted in a denial of a visa if the Petitioner revealed his guard service. (Appendix A 64a).

The Court also found that the District Court lacked Equitable Powers in a denaturalization proceeding to consider an alternative equitable judgment for the Petitioner.

REASONS FOR ALLOWING THE WRIT

1. Conflict Of Appellate Court Decisions.

There are conflicting decisions at the Appellate Court level as to what is meant by the second standard of the test of materiality in the case of *Chaunt* v. *United States* (1960), 364 U.S. 350, 81 Sct. 147, 5 L. Ed. 2d 120.

The Supreme Court held in the case of "Chaunt" that:

"The Government has failed to show by clear, unequivocal and convincing evidence" either (1) that facts were suppressed which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. Chaunt, Supra, 355.

Since that decision in 1960, there has been only one Supreme Court decision on the test to be applied to determine the materiality of a misrepresentation, and that was in the case of *Costello* v. *United States,* 365 U.S. 265 (1961).

In that decision the Court found that the suppressed facts in and of themselves justified denial of citizenship. Costello, supra, 272.

To date, there has been no Supreme Court decision involving the application of the second test or standard, although this important question was raised below in Appellate Court decisions:

In the case of *United States* v. *Rossi,* 299 F2d 650 (9th Circuit 1962) the court considered on appeal whether Rossi, who concealed his true identity by impersonating his brother who was a Chilean citizen, to avoid quota restrictions on Italians, committed a material misrepresentation that should revoke his citizenship. The Ninth Circuit Court's holding was that the Government must prove the existence of ultimate facts which would have justified the denial of citizenship.

In quoting from United States, ex rel. *Fink* v. *Reimer,* 96 F.2d 217 (2 Cir. 1938), the Court in "Rossi" said:

A fact suppressed or misstated is not material to an alien's entry, *unless* it is one which, if known, would have justified a refusal to issue the visa. (emphasis supplied). Id at 652.

The "Rossi" Court in effect found the Government had not shown that the misrepresentation would have resulted in a denial of an Immigration Visa because the ultimate and underlying fact, the true identity of Rossi, had not been shown to justify denial of citizenship.

Subsequently, in the case of *La Madrid Peraza* v. *Immigration and Naturalization Service,* 492 F 2d 1297 (9th Cir. 1974) also a deportation case, that Court held that a suppressed fact is not material unless the truth would have justified a denial of an Immigration Visa.

The Fifth Circuit Court of Appeals has reached a holding which substantially differs with that of the Ninth Circuit Court

of Appeal's decisions in the "Rossi" and "La Madrid Peraza" cases.

The Fifth Circuit has held that "the Government need only prove by clear and convincing evidence that disclosure of the true facts would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship." *United States* v. *Fedorenko,* 597 F. 2d 946 (5th Circuit 1979).

The decision of the Ninth and Fifth Circuit Courts clearly are in conflict as to the standard or requirements of proof as to the second test or standing in "Chaunt."

2. The Question Of Materiality.

a. Conflict of Decisons.

While the Supreme Court decision in "Chaunt" requires clear, unequivocal and convincing evidence of a material misrepresentation, a substantial question exists as to the burdern of proof as to the standards of "Chaunt" and as to how the burden of proof is satisfied. The conflict mentioned as to the Appellate Court rulings on the second standard in "Chaunt" points out the question of what must be proved to satisfy the second standard in "Chaunt".

In addition, what proof is acceptable in establishing the materiality or compliance with the language of "Chaunt" is also at issue.

b. Clear, Convincing And Unequivocal Evidence Requirements.

The Government attempted to establish through the testimony of a former Vice-Consul whose service began in 1951, approximately two years after the Petitioner's application for Immigrant Visa was submitted to the Vice-Consul at Wentorf,

Germany, that the Petitioner would have been denied an Immigrant Visa if he had disclosed facts about his presence at Treblinka.

Admittedly, the witness Kempton Jenkins, who testified as an expert witness, did not know, or have any contact with, the Vice-Consul at Wentorf who processed the Petitioner's Visa in 1949.

The Government did not establish the identity of the Vice-Consul at Wentorf.

Neither did it prove by clear, convincing and unequivocal evidence the Vice-Consul processing the Petitioner's Visa had any knowledge of Treblinka, that he would have ordered an investigation if known, and if revealed by the Petitioner that the term Poelitz was known to him, and would have prompted an investigation, and that had the Petitioner revealed his guard duty under claim of involuntary duty, he would have granted or denied the Visa, as might be his discretion.

The Supreme Court has placed the same burden of proof on the Government under both standards or tests in "Chaunt," which requires "clear, convincing and unequivocal proof which does not leave the issue in doubt." Chaunt id.; *Schneiderman* v. *United States,* 320, U.S. 118, 125, 158; *Baumgarter* v. *United States,* 322 U.S. 665, 670.

The Supreme Court further stated in Chaunt quoting from *Baumgarter* v. *United States,* supra 671, "we deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'"

The question at hand is whether the testimony of Kempton Jenkins which is circumstantial, based in part on hearsay and in part on personal experiences in administering the Act, could be accepted to show the state of mind of a Vice-Consul whom he never knew or had any personal knowledge of?

Does not the testimony of Mr. Jenkins have little probative value in the absence of corroborative evidence or direct evidence which would establish the guidelines in 1949, the personal knowledge and manner in which the Vice-Consul at Wentorf processed the Fedorenko Visa that day of October 12, 1949. *United States* v. *Oddo,* 314 F2d, 115 (2nd Cir. 1963).

The Fifth Circuit Court of Appeals disregarded the weight the District Court gave the testimony of Kempton Jenkins and found facts rejected by the District Court. *United States* v. *Fedorenko,* Id. 952, 953. (Appendix 65a).

In *United States* v. *Oddo,* Id. 117, the Second Circuit Court stated:

Testimony as to custom and practice is admissable as circumstantial evidence, subject to the usual condition that its probative value outweighs any possible impact.

The Fifth Circuit of Appeals, apparently substituted its judgment for that of Judge Roettger as to the weight to be given the Jenkins testimony, in opposition to its ruling in the case of *Vasquez-Mondragon* v. *Immigration and Naturalization Service,* 562 F 2d 1225 (5th Cir. 1977) wherein it held at page 1226 that it was not "permitted to substitute our judgment for that of the Board or the (Judge) with respect to the credibility of this testimony or the ultimate findings of fact based thereon."

3. The Alternative Basis For The Holding Of The District Court-Equitable Considerations

The District Court's decision of 54 pages contained an alternative basis for its holding, stating the equities of the case demand judgment for Fedorenko. (Appendix 49a, 54a).

The issue would appear to be one of first impressions for the Supreme Court as to the discretion of the District Court to consider an equitable basis for its handling in a denaturalization proceeding commenced many years after entry to the United States. (Appendix 52a).

There is no question that a denaturalization proceeding is a suit in equity. *Knauer* v. *United States,* 328 U.S. 654.

The District Court's decision states that in light of the uncertainty of the Petitioner's conduct 35 years ago, and his 29 years of good citizenship, all doubts, uncertainties and questions which have not been resolved unequivocally, should be resolved equitably in favor of the Petitioner. Thus, the District Court considered its equitable powers as authority to find an equitable basis for its holding not inconsistent with its holding that the Government failed to meet its burden under Chaunt. (Appendix 54a, 55a).

Sound reasoning requires that a reading of Chaunt when applied to this case imposes upon the Government the burden of proof that requires complete proof of all issues in dispute by clear, convincing and unequivocal testimony, that testimony of an expert which is circumstantial and not based on facts as to his opinions, inferences or conclusions should be rejected or limited.

As the Fifth Circuit Court of Appeals noted in a 1974 decision fo *Stanall* v. *McKenzie Tank Lines, Inc.* (5th Cir. 1974), 497 F2d 529, "An expert must be in possession of sufficient proved facts to enable him to express a reasonable accurate conclusion, and the facts upon which he bases his opinion must be disclosed..." The Testimony of Kempton Jenkins can not be used to establish a state of facts which were not proved, that is, those facts which would arise out of the processing of the Petitioner's Visa by the Vice-Consul in Wentorf.

CONCLUSION

Certiorari should be granted and the judgment of the Fifth Circuit Court of Appeals should be reversed and the Judgment of the District Court reinstated.

RESPECTFULLY SUBMITTED,

By Brian M. Gildea
Celentano & Gildea

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APPENDIX

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Exhibit A Opinion of District Court

MICROFILMED ON
ROLL NO.____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA

Plaintiff

vs.

FEODOR FEDORENKO

Defendant

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The Government seeks to strip defendant of his American citizenship granted in 1970. Basically the Government charges that defendant lied on his application for a visa in 1949, particularly in not disclosing he served as a guard at the death camp at Treblinka during World War II. Further, the Government charges he participated in atrocities at Treblinka, precluding him from having the good moral character necessary to become an American citizen. Defendant, originally a Ukrainian, contends that he was not a guard voluntarily but he was forced to be one as a prisoner of war of Nazi Germany and denies committing any atrocities at Treblinka or elsewhere.[1]

DEFENDANT'S CONDUCT IN AMERICA

Defendant Fedorenko came to America in 1949 and has been a respectable resident ever since. Following his arrival he worked on a farm in Connecticut. After a year he worked in a factory in Waterbury and then went to work for Scovill, a manufacturer of brass and copper products; he worked there, usually as a foundry worker, for 20 years until his retirement. He was emphatically described by fellow-workers at Scovill as an "excellent" worker who did

[1]This memorandum opinion contains the court's findings of fact and conclusions of law in compliance with Rule 52, F.R.C.P. In addition, the court has included considerable detail about the evidence because of the extensive review of evidence afforded to the Supreme Court and Court of Appeals in denaturalization cases. U.S. v. Nowak, 356 U.S. 660, 78 S.Ct. 955 (1958) and others. Further, the court has added observations to give the flavor of the trial as well.

not speak unkindly of anyone; that he was so good a worker he had no problems and was a "real gentleman" with no apparent prejudices of any type. The union representative at Scovill testified strongly as to his reliability and performance -- a man who never put in a grievance and never had one filed against him. His foreman described defendant as a man who did his job well and cheerfully -- a very conscientious and a very good worker.[2] The court accepts these appraisals as accurately reflecting defendant's work-life and personal life for 29 years.

The defendant married while in America but his American wife has died. For background: until the early 1960's defendant believed his wife and two children in Russia had been killed during World War II. He had been so advised at a prisoner of war camp by two brothers from his home town. He has since discovered his wife and sons are alive and living in Crimea; he has visited them in the 1970's. His only schooling was in his native Ukraine for three years from the years 1915 to 1918, during the defeat and collapse of Czarist Russia.

Defendant has retired on a social security pension and a pension from his 20 years labor at Scovill. He doesn't own a car; he doesn't own a house; he owns no real estate except a cemetery lot, and he has a burial insurance policy. He has accumulated a life savings of $5,000 but owes his attorney an unknown fee for a trial which lasted 14 days. He has never been arrested in 29 years -- not even for a traffic offense. His one failure as a resident and citizen in 29 years: he received one parking ticket. Feodor Fedorenko has been a hard-working and responsible American citizen.

[2]The only reference to World War II by defendant any fellow-worker remembers was when he cried about the loss of his wife and sons.

VENUE AND PRELIMINARY MATTERS

This suit was instituted in August, 1977 while defendant was a resident in Miami Beach, pursuant to the requirement of 8 U.S.C. §1451(a) that suit be filed "in the district in which defendant resides." Defendant challenged venue on the grounds that his presence in Miami Beach, where he was then living, was only temporary and that his permanent residence was in Waterbury, Connecticut. The court denied defendant's motion to transfer, holding that venue properly lay in the Southern District of Florida.[3]

However, in an effort to alleviate defendant's claim of financial hardship in producing witnesses in Florida the court -- through the gracious hospitality of the United States District Court for the District of Connecticut -- held a portion of the trial in Waterbury.[4] Although the hearing in Connecticut was originally scheduled to follow presentation of the Government's case in Fort Lauderdale in April, the Government's case was postponed until late May and June because of a recent appearance by Florida defense counsel.[5]

[3]Although the Government produced only minimal proof to justify denial of the motion, defendant admitted at trial that he was a resident of Miami Beach from August 1976 to September 1977 after suit was filed.

[4]The court appointed itself a special master under Rule 53 F.R.C.P. for the purpose of holding a hearing and receiving evidence in Waterbury. The parties stipulated that the evidence be received without the necessity of filing the report and further that it could be considered as if it had been presented at trial.

[5]Defendant's initial counsel, Brian Gildea of New Haven, was permitted to withdraw after Gregg Pomeroy of Fort Lauderdale filed his appearance. However, Mr. Gildea assisted at the hearing in Connecticut.

Consequently, part of defendant's case was heard out of turn prior to the presentation of the Government's case in Fort Lauderdale without objection by either side. Two government witnesses also testified in Waterbury without objection, as a convenience to the witnesses.

A second problem developed prior to trial with regard to the Government's obtaining testimony of foreign witnesses. Early in November 1977, the court learned of the Government's intention to take depositions out of the country. Because it was concerned that the Government might intend to produce only deposition testimony of foreign witnesses, the court sua sponte entered an order prohibiting the use of deposition testimony at trial in order to enable the court to observe the witnesses' faces, body language and reactions in the courtroom, particulary in the presence of defendant and also his reactions to their testimony. The court felt that in-court testimony would be particularly critical in view of possible identification problems and the passage of 35 years since the events complained of at Treblinka. In addition, depositions taken by the Government in Israel almost surely would not have provided cross-examination. In compliance with the court's order the Government was compelled to bring its witnesses from Israel to Fort Lauderdale.[6]

[6]The court in its order suggested that if the Justice Department wished to bear the expense of defendant and his counsel, and the court's as well, to hear testimony of the Israeli witnesses at some neutral site such as Athens or Istanbul, the court would be willing to do so as a Special Master. The Justice Department declined but the court has since been informed by Government counsel at the pretrial conference that it would have been more economical for them to have done so inasmuch as they brought ten witnesses from Israel for the purposes of trial and most insisted on bringing their spouses as a condition of testifying.

Subsequent to the court's order regarding witnesses' testimony, the Judicial Conference of the United States passed a resolution at the March 1978 meeting prohibiting United States Courts from holding court outside the United States. In view of the expense problem of the Israeli witnesses, as well as the much more critical problem of obtaining testimony of the Russian witnesses discussed subsequently in this opinion, this court must respectfully suggest that special circumstances might justify authorization for a United States District Court to hold evidentiary hearings outside the United States for trial purposes.

CHARGES AND DEFENSES

Title 8 U.S.C. §1451(a) provides that for good cause shown the United States Attorney shall institute proceedings to set aside an order admitting a person to citizenship and cancel the certificate of naturalization on the grounds that such order and certificate were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation" and concealment as grounds for denaturalization.

In Count 1 the Government charges that defendant gave false information in his application for Immigration Visa and Alien Registration, and that his citizenship was therefore "illegally procured" because he was never lawfully admitted to the United States.

Counts 2 and 3 allege that defendant was not admissible to the United States under the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, nor was he otherwise admissible under the Immigrations Laws and Orders and Regulations issued thereunder because he participated in the commission of crimes and atrocities against civilians in the Treblinka concentration camp during 1942-43.

Count 4 alleges that defendant wilfully failed to disclose the commission of crimes at Treblinka in response to question #6 on his Application to File Petition for Naturalization (Form N-400).

In Count 5 the Government charges that defendant wilfully failed to disclose his service as an armed guard for the Germans in response to question #7 on the N-400 form.

Finally, Counts 6 and 7 allege that defendant lacked the good moral character required to become a citizen by virtue of his commission of atrocities at Treblinka and the giving of false statements with request to questions #6 and #7 as alleged in Counts 4 and 5.

DEFENSES

Defendant Fedorenko in his answer raised the special defenses of waiver and estoppel, improper venue, and the statute of limitations. Primarily defendant contended that the long passage of time between the incidents at issue and the institution of this law suit served to bar the Government from proceeding. The defense of improper venue was based on the allegation that defendant did not reside in Florida at the commencement of this law suit.

At trial, defendant virtually abandoned these special defenses; instead he denied generally having committed atrocities or crimes against humanity while a prison guard at Treblinka. Also, defendant sought to establish that his service as a guard at Treblinka and elsewhere was performed involuntarily while he was himself a prisoner of war.

BURDEN OF PROOF

Because of the importance of a loss of citizenship to the individual, a denaturalization proceeding is a most sensitive trial.

Thus, the burden of proof in denaturalization cases has been clearly stated by the Supreme Court in Nowak v. United States, 356 U.S. 660, 663, 78 S.Ct. 955, 957 (1958), as follows:

> Where citizenship is at stake the Government carries the heavy burden of proving its case by "'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt'***." Schneiderman v. United States, 320 U.S. 118, 158, 63 S.Ct. 1333, 1352, 87 L.Ed. 1796. "Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness." Id., 320 U.S. at pages 122-123, 63 S.Ct. at page 1335.

As the Supreme Court has stated:

> [Denaturalization cases] are extremely serious problems. They involve not only fundamental principles of our political system designed for the protection of minorities and majorities alike. They also involve tremendously high stakes for the individual. For denaturalization, like deportation, may result in the loss "of all that makes life worth living." (citation omitted) Knauer v. United States, 328 U.S. 654, 659, 66 S.Ct. 1304, 1307 (1947).

PUBLISHED POLICY CONCERNING DENATURALIZATION CASES

A failure to follow the published policy of the Department of Justice does not bar the bringing of the suit. United States v. Melligan, 573 F.2d 251 (5th Cir. 1978). However, it is interesting to observe the policy of the Department of Justice with respect to bringing denaturalization cases:

> "In the opinion of the department, as a general rule, a good cause is not shown for the institution of proceedings to cancel certificates of naturalization alleged to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country.[7]

[7]The statement of policy continues, as follows:

The legislation referred to, being retroactive, 21/ is construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individuals concerned. Ordinarily, nothing less than the betterment of the citizenship of the country should be regarded as sufficient to justify the disturbance of personal and property rights which cancellation proceedings may occasion. This does not mean that such proceedings should not be instituted in any case where willful and deliberate fraud appears, as the perpetration of such fraud would indicate lack of the moral qualifications necessary for citizenship. If, however, many years have elapsed since the judgment of naturalization was apparently so procured, and the party has since conducted himself as a good citizen and possesses the necessary qualifications for citizenship, cancellation proceedings should not, as a rule, be instituted." Dept. of Justice Circular Letter No. 107 (Sept. 20, 1909), reprinted in Immigration and Naturalization Service Handbook at 6508, 08.1.

The court cannot help but question the application of this policy towards defendant in view of his 29 years of lawful conduct -- except for one parking ticket -- and hard work here in America.

The court observed at the trial and iterates it here: never in six years on the bench has the court seen the Government indulge in such expenses as daily copy of the reporter's transcript of testimony or having four lawyers at the Government's counsel table.[8] Such expenditures of the taxpayers' treasure and talent have not occurred in this court's previous cases such as the prosecution of an alleged Mafia don, a continuing criminal enterprise case, the only dangerous special offender indictment in this district for the reputed salaried slayer for a narcotics importation gang which was responsible for at least 26 murders in the South Florida area according to the testimony in the District Court in Miami, as well as many other serious prosecutions. Clearly the expenditure of the resources of the Executive Branch lies within the discretion of that branch of the Government. However, the court must venture that in view of the similarity in the burden of proof between criminal cases and denaturalization cases, and in view of what is at stake for the naturalized American citizen, the defendant in a denaturalization case ought to have the same resources that are provided a defendant in a criminal case under the Criminal Justice Act; in short the naturalized citizen -- provided the defendant's financial condition warrants it -- should receive the benefit of court-appointed counsel and other experts at the Government's expense.

[8]In addition, the Government which bears the expense of translators, hired two Russian translators for defendant's testimony. The extra one sat behind Government counsel's table -- another first.

The Government neither provided a copy of the daily transcript to defendant nor did it offer to provide a "back-up" translator when the Israeli witnesses testified.

One more observation needs to be made before moving to a consideration of the evidence. If ever a case supported the Judicial Conference rule barring cameras from the courtroom, this case does. From the beginning it was like a Hollywood spectacular and polarized the residents of South Florida.

As an example of some of the emotional intensity surrounding the trial, the Jewish Defense League ran ads in newspapers offering chartered buses from Miami Beach to Fort Lauderdale on opening day. A demonstration outside the courtroom ensued with a chant: "Who do we want? Fedorenko. How do we want him? Dead." After the court was interrupted twice and the first three warnings were ignored by the demonstrators, a leader who was using an amplified bullhorn was arrested. A counter-demonstrator appeared two days later with an ensuing confrontation. Lamentably, defendant's counsel was briefly attacked by women spectators at the courtroom entrance at the close of the trial. If the trial had been brought into South Florida homes by television, the incidence of such confrontations likely would have increased.[9]

EVIDENCE AS TO DEFENDANT'S CONDUCT, 1941-1949

PRE-TREBLINKA[10]

Defendant was mobilized on June 23, 1941, almost immediately after the invasion of the Soviet Union by Nazi Germany. He was a truck driver and the truck he drove was also mobilized. He had no previous military training and in the next two to three weeks his group was encircled twice by the German Army. He escaped the first time but was captured three days later by the Germans with about one-third of his fellow Russian soldiers.

[9]Fortunately, the U.S. Marshal Service and the Fort Lauderdale Police Department performed at their usual outstanding level of competence in maintaining courtroom decorum and order in the environs around the court facility. The deputy marshals even apprehended one news reporter going through the judge's wastebasket under the bench.

The court is unaware if the Government is bringing charges against the demonstrators under 18 U.S.C. §1507.

[10]The only evidence as to defendant's activities before Treblinka was given by defendant plus some opinions voiced by Government's expert Jenkins.

The Germans transported several truckloads of prisoners to Zytomir, a former Soviet training camp, and defendant described the conditions as very bad and with little water or food; the camp housed about 50,000 to 100,000 prisoners, with no barracks available for them. After two to three weeks he was then transferred to Rovno for about 10 days where there were fewer people than at Zytomir; the camp was surrounded by electrified barbed wire.

Next he was transferred to Chelm, Poland, a camp also ringed by barbed wire rolls. The prisoners who tried to escape were trapped on the barbed wire and their plight was quite visible to fellow-prisoners in the morning. While at Chelm he worked in the kitchen, dug holes and built barracks. Defendant estimated the population at Chelm at about 80,000 prisoners.

Defendant described the conditions at Chelm as so bad that if you became ill you rarely recovered. He also indicated that food was at a minimum and that approximately 40,000 prisoners of war died over the winter of 1941-1942. Defendant testified that he supplemented his food intake by eating grass and roots.[11]

[11]The court can take judicial notice from numerous news stories published during the trial that many spectators at the trial had been in various concentration camps or death camps in Europe or had lost relatives there, or both.

Defendant's testimony on direct began shortly after lunch. During the lunch recess a memorial service for the dead at Treblinka was held in the park-like area immediately outside of the courtroom. (The United States courtroom in Fort Lauderdale is in temporary quarters and the splendid new facilities for the Fort Lauderdale court and Federal Building will not open until about three months hence). Judging from the spectators' reactions to the colloquy over translating problems at the beginning of defendant's testimony, the spectators were hardly receptive to defendant; but that was to be expected as he had been described over the period of two weeks by various witnesses as committing gross atrocities.

Defendant described his early personal life; when he revealed his loss at the age of eight of his father in World War I and that his father was killed "by the Germans, of course", the courtroom became immediately quiet as if an engineer in the sound control booth had turned the gain control knob down to zero. When defendant testified about surviving by eating roots and grass, the courtroom became even quieter although that didn't seem possible.

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Defendant testified he would receive beatings from German soldiers when he didn't understand and comply with orders. On two occasions he was hit with a rifle butt, once when he went to pick up a beet and also when he picked up an apple a Polish citizen had thrown. Defendant testified the conditions at Chelm were so bad that he would have died if he had not been transferred to Travnicki.

One day at Chelm the Germans assembled the Russian prisoners and walked down the line selecting 200 to 300 who were sent on to Travnicki. Defendant vehemently denies volunteering and described the selection process: "they (the Germans) didn't ask; if you didn't go they'd shoot you down like a dog."

The court specifically finds that the defendant did not volunteer for transfer to Travnicki.

At Travnicki most of the guards were Volksdeutschers (ethnic Germans who resided outside Germany in the areas occupied by the German Army). Defendant is not a Volksdeutscher but Ukrainian. He was doing carpentry work at Travnicki and testified he had to work or he might be executed. He received several beatings from the guards. Just as defendant was a hard-worker in America, he clearly did not shirk work responsibility at Travnicki -- undoubtedly why the Germans selected him. He indicated that sometimes a loaf of bread was given for working.

In the spring of 1942 the Germans gave black uniforms to all of the prisoners. Volksdeutschers also wore black uniforms but theirs were well-tailored and of better material. After the barracks had been constructed at Travnicki the Germans gave instruction in the firing of rifles, such as field-stripping

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and in marching. They were not allowed to fire a rifle or to keep one. They also received some privileges such as being able to walk down the road outside of the camp. Defendant testified that he went to a Polish home where he gave them soap and they fed him. He added that if a prisoner did not come back he would be executed (when located).

In the spring of 1942 defendant was sent to Lublin where at first the prisoners guarded their own camp and then were sent to the Jewish ghetto; again the Germans did not ask for volunteers but demanded them to go. At Lublin the Soviet prisoners guarded houses, furniture -- whatever was left; they were issued rifles which were not fired. The Soviet prisoners were converted from workers to guards at Lublin.

From Lublin defendant was sent to Warsaw along with about 80 to 100 others and the Soviet prisoners were asked if they wanted to go but none volunteered: there was "no choice." They were transported with a few Germans and two or three zugwachmaenner (spelled Zugwachmänner in German).

Defendant was transported to Treblinka as a prisoner-guard in approximately September 1942.

TREBLINKA

The Government called six survivors at Treblinka, four of whom served as working prisoners at Camp 1 and two in what was described as Camp 2 (where the gas chambers were located.)[12] Each of the Government witnesses testified as to general or specific instances of murder or brutality on the part of defendant.

[12]Inasmuch as the actual operation of Treblinka is not an issue, it will be described in footnote form to assist in evaluating evidence of what defendant actually did there.

Defendant admits he was a guard at Treblinka; however, he claims that he was a guard involuntarily and denied emphatically that he committed any atrocities or any of the specific acts of brutality described by the witnesses.

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12 (continued)

Because of the nature of the Government's charge and also the nature of Fedorenko's defense, evidence was presented in clinical and gruesome details about the operation of the death camp known as Treblinka. The testimony was so gruesome that on more than one occasion the court doubted it would be possible to continue taking evidence until the usual recess time. Early recesses were required for the witnesses on several occasions.

Treblinka was a human abattoir. It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead before nightfall. It was operated with a barbarous methodology -- brutally efficient -- and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization.

The camp at Treblinka was described repeatedly by witnesses with details to shock any listener. The camp was garrisoned by approximately 30 members of the SS and 150 Soviet, mostly Ukrainian, guards. Also in the camp were approximately 700 Jewish prisoners, mostly men, who performed various tasks.

The Government witnesses were among the working prisoners who escaped during an uprising on August 2, 1943. Each had been there from eight to ten months as a laborer.

It is important to bear in mind that no documentary evidence whatsoever was introduced by the Government or defendant as to the duties or conduct of defendant at

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12 (continued)

The general methodology emerges from the evidence: The Jewish victims were either rounded up from ghettos in Poland by the SS and Russian, Ukrainian or Latvian guards or were lured into a square by handbills promising each person three kilos of bread and a quantity of jam. One witness, Josef Czarny, then 15, came to the square in response to the notice after his parents and three sisters had starved to death in the Warsaw ghetto. After sometimes being held for as long as three days, they were then herded, with beatings, into cattle cars on a train. The train trip took occasionally three days, although Treblinka was located only about 100 kilometers east of Warsaw. No food or water was permitted the prisoners on the train and some slaked their thirst with perspiration and urine. Several persons perished during the trip and approximately 100 persons would be in the cattle cars or box cars.

Sometimes four or five trains (transports) would arrive at Treblinka during a day but occasionally there would be none. Each transport would contain 2,000 to 3,000 prisoners. The prisoners, unless selected as a labor prisoner, would be exterminated that same day either in a lazaret or the gas chambers.

Apparently to maintain order the prisoners aboard the train were told they were going to a labor camp although at least one witness testified of knowing what Treblinka was. He also testified he could smell the burning flesh upon arriving there. However, various ruses confronted the prisoners as they were ordered from the trains onto the ramp between two rows of SS troops and Soviet guards urging them to run faster and beating them with whips and rifle butts. The ruses included a sign over the camp entrance in German bearing a motto that "work makes life sweeter", and an orchestra playing at the entrance. The orchestra was conducted by Herbert Gold (a noted conductor from Warsaw, per Fort Lauderdale News article dated June 3rd, 1978). Mr. Gold and the members of the orchestra were, of course, working prisoners. A well was nearby but it was dry.

Treblinka. Therefore the issue turns entirely on the testimony and credibility of the witnesses.

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12 (continued)

In view of the relatively small number of SS and Soviet guards, even though well armed, compared to the large number of labor prisoners and arriving prisoners, the system of ruses, beatings, and humiliation apparently was to assist the SS in maintaining order by keeping the arriving prisoners confused and bewildered and thereby docile. In addition, it also prevented organization among the prisoners which might have resulted in a charge en masse by the prisoners. Only the prisoners arriving after the ghetto uprising in Warsaw in the spring of 1943, for example, refused to doff their clothing upon their arrival.

A grisly establishment was camouflaged and identified as a lazaret, meaning first aid station. The working prisoners were also at the entrance of the lazaret bearing Red Cross armbands and a Red Cross flag flew over the entrance. Another cruel ruse: it was a charnel house.

The purpose of the lazaret was to receive and liquidate the aged, the crippled and children without parents. These persons were separated from the rest of the arriving prisoners and taken to the lazaret which had a bench on the bank of a pit three meters deep and approximately 20 meters long and 10 meters across. After being stripped the prisoners were seated on the bench and were executed by being shot in the back of the head; their bodies would fall into the pit. A fire was kept constantly burning in the pit to dispose of the corpses.

The other arriving prisoners were separated into groups of men and women; the men were ordered to remove all their clothing in the open "square". The clothing was processed by the working prisoners and the camp was described as having "mountains of shoes" and "mountains of eye glasses".

The female prisoners were herded into a barracks where they were ordered to disrobe; they then filed into a barber shop set up at the end of the barracks where 20 men served as barbers. Each barber had about one minute to cut as much hair as possible from the head of each woman. Apparently the hair was used for various products as well as being steam cleaned in an effort to find if any valuables were hidden there. From the barber shop the women were herded out onto the path and both men and women made to run to Camp 2 where the gas chambers were located, referred to as "baths".

As final sardonic actions, the path to Camp 2 was termed by the SS "himmelweg" -- the road to heaven. And on the gas chambers in Camp 2 was painted the Star of David.

Treblinka -- bleaker than Bruegel's Triumph of Death. The death toll? One million victims, according to one witness.

The first witness, Eugen Turowski, testified that he had seen defendant at the lazaret many times shooting prisoners. He testified that defendant carried a leather whip with metal balls on it and frequently saw him beating arriving prisoners. He also claimed defendant shot prisoners who, after escaping and then being recaptured, were hung upside down as an example to the other prisoners. Turowski described defendant in 1942 as having specific eyes that were "slightly Chinese looking" and that defendant was a non-commissioned officer who spoke "bad German" and was called by name by the SS personnel. Turowski claimed there were no Volksdeutschers at Treblinka but that Biedermann was the leader of the "Ukrainian" guards and that Rohoza was not a leader of an Ukrainian unit.

The second witness, Schalom Kohn, testified that defendant beat him with his whip on two occasions and he saw defendant beat other Jewish prisoners at the arrival of the transport. He also testified he saw defendant beating prisoners at the lazaret.

Kohn described defendant as "mean-looking", and when he walked around the courtroom there was the same "mean-looking" face; that was his explanation for being able to identify defendant in the courtroom.

Josef Czarny, clearly the least credible of the survivor witness, testified that at the arrival of every transport he saw defendant beating people as they emerged from the cars, and that he saw defendant on one occasion shoot a prisoner at the lazaret. Czarny claimed to have seen defendant at every one of the twice-daily assemblies, and that there were no other Ukrainians at the daily assemblies.

Mr. Gustaw Boraks was the last of the survivor witnesses who worked in Camp 1, the receiving area where the lazaret

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was located. He was the most candid and credible of the survivor witnesses. Boraks testified he would go to the arrival of the transport two or three times a week to look for friends or relatives and saw defendant there although he had only a few minutes to stay in that area. He never saw defendant hitting prisoners or had any personal confrontations with him.

From his position in the barber shop nearest the door at the end of the barracks where the women had to undress, he heard a shot one day. Boraks rushed to the door and saw defendant, the SS and other Soviet guards and a woman who had been shot in the shoulder. He did not see Fedorenko shoot her but testified that defendant had a revolver in his hand and was closer to the woman than anyone else. He subsequently cut the woman's hair before she was sent to the gas chamber; she told Boraks that she had been shot because she did not want to undress. He didn't know who shot the woman and the woman said she didn't know who it was either. He further testified that defendant did nothing wrong in the barracks with the women who were undressing. He testified he had seen defendant chasing people on the pathway to Camp 2 a few times and he knew it was defendant because he wore a black uniform while the others wore khaki. He testified that Fedorenko was some type of leader of the Ukrainian guards.

Two witnesses testified about working in Camp 2, where the gas chambers were located. The first, Sonja Lewkowicz, testified that defendant had a long and terrifying face and that she saw him in Camp 2 many times. She testified that on one occasion she saw him from a distance of 20 meters shoot a Jewish prisoner in Camp 2, but when she realized

what was happening quickly turned her head. She never remembers defendant being at the twice-daily assemblies and never remembers seeing him beat or mistreat any prisoners other than the shooting incident.

The last of the survivor witnesses, Pinchas Epstein, was a witness with considerable intensity showing on his face; he testified he saw defendant beat Jewish prisoners and that on one occasion defendant shot and killed a friend of his named Laibel from his home town. On direct examination he described the incident as having occurred when Laibel's partner was returning alone from dumping a corpse into one of the pits in Camp 2.

On cross-examination Epstein stated he was Laibel's stretcher-bearer partner on the day Laibel was shot. That answer was completely inconsistent with his testimony on direct; upon his realization of that he began to squirm and fidget in the witness stand. In addition, Epstein did not mention to investigator Martin Kolar the matter of the shooting of his home-town friend or of any of the beating incidents attributed by him to defendant despite a three hour conversation with Kolar. Epstein acknowledged that Kolar told him at the interview that the purpose of the interview was for testimony against Fedorenko.

Defendant's testimony was basically a denial of all charges. He contended he was a wachmann -- a sentry or guard -- not a non-commissioned officer. He testified that he was never in the barracks with the women undressed; he was only at the arrival of the transport on one or two occasions and did not know what was going on at the camp. At least the latter is not credible to this court, neither in content nor from the manner in which the testimony was

given. Defendant was far from convincing in his manner of speaking and appearance when he testified about unawareness of what was going on at Treblinka. (That testimony was in distinct contrast to his usual earnest testimony where he often volunteered extra items in his answers.) He testified he patrolled the fence as a guard and served in the tower. He testified he only served as a sentry outside of Camp 2 one day and saw what was going on, and reported to his zugwachmann -- whom he identified as Rohoza -- that he couldn't eat or sleep and didn't want to go back to that post again. He denied participating at all in Camp 2 or ever being near the gas chambers.

The phrase most constantly used throughout the trial was zugwachmann. The survivors were all convinced and all testified that zugwachmaenner were leaders among the Ukrainian or Soviet guards and that defendant was one.[13] The word does not translate easily and despite the request of the court for any source of material providing a translation, none was offered. The survivor witnesses claimed that defendant was a zugwachmann because he had one or two stripes on his shoulder. Defendant explained the stripes away as being good conduct awards because he didn't walk around dirty or get drunk.

The Government offered no expert testimony on the rank-structure and testimony of their expert witness, Mr. Kempton Jenkins, didn't quite touch on the subject. His testimony about the camps was consistently inaccurate.[14]

[13]Apparently, zugwachmann is the leader of a group of guards or sentries and the group is the size of a squad (could be as large as one-third of a company). See Heath's German Dictionary.

[14]For example, see text at page 36.

Defendant's description of who was a zugwachmann at least fits a logical pattern. He characterized zugwachmaenner as being Volksdeutschers because the Volksdeutschers', who were of ethnic German background, ability to speak both German and Russian or Ukrainian enabled the SS to use the Volksdeutschers as zugwachmaenner to transmit orders. From the evidence the chain of command in a descending order went as follows: SS (Schutzstaffeln); Volksdeutschers as zugwachmaenner; Soviet, basically Ukrainian, guards; working prisoners with a Nazi-imposed hierarchy of a head kapo, kapos, vorarbeiters (foremen), and regular working prisoners. There is nothing in the evidence to suggest that Fedorenko is a Volksdeutscher[15] and there is nothing in the record from his background or education to raise the slightest suspicion that he could have learned more than a few words of German.

Fedorenko's testimony that only Volksdeutschers qualified as zugwachmaenner is supported by the berthing and messing arrangements at Treblinka. The SS didn't let the Volksdeutschers sleep or eat in the same barracks with them. Instead, the Volksdeutschers were permitted to sleep in a separate barracks -- apparently giving them some privileges because of their German background -- but were required to eat with the Soviet prisoner-guards, facilitating supervision of the guards by the zugwachmaenner.

The court specifically finds defendant was not a Volksdeutscher and not a zugwachmann.

[15]The court considered the possibility that defendant's mother was an ethnic German. The first (Christian) name, Anna, is not an infrequent one both among German and Russian names. Defendant consistently listed his mother's maiden name as Hubar. The court's very limited familiarity with the German language doesn't cause any suspicion that the surname, Hubar, is a German name. However, on defendant's application for citizenship her name is spelled H-u-b-e-r; that spelling is in red ink and those notations were added by the Immigration and Naturalization Inspector Zimon. Notice can be taken of library resources which indicate that the name is a Ukrainian rather than German name; for example, O. Hubar has been cataloged by the Library of Congress as the author of a work on Ukrainian literature.

Even if defendant's mother were an ethnic German, there is nothing to indicate that his father was an ethnic German. It seems highly doubtful -- and speculative at most -- to assume the German language was spoken in the Fedorenko home, at least before the father's death. Far more importantly, the evidence overwhelmingly rebuts any such speculation.

PHOTO SPREADS

In view of defendant's assertion that he was only a perimeter guard who didn't commit any atrocities at Treblinka, the issue of identification is the heart of this case. The witnesses' identifications of defendant as the perpetrator of the crimes described were based on recognition of his photo and his person in the courtroom. In view of the passage of 35 years from the date of the incidents, the court must scrutinize these identifications and the circumstances under which they were made with great care.

The subject of pretrial and in-court identification and their reliability have received thorough attention by the courts in criminal cases. This attention has been focused on the dangers that pretrial identification may taint or make unreliable subsequent in-court identification. Thus to preserve the integrity and fairness of pretrial identification procedures, courts have imposed on their use certain requirements of due process. See, e.g., Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972); Stoval v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967), Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969).

Although the instant case is a civil case, the concerns of the Supreme Court regarding the reliability and probative value of identifications made in criminal cases are no less applicable here. Thus the court turns to those cases to determine what weight to give the testimony in this case in view of the circumstances surrounding the witnesses' identifications.

The problems inherent in the use of photo spreads as a pretrial identification procedure were pointed out in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968). In the usual case, where a witness has not had an opportunity to get a good look at a criminal under favorable conditions, there is a danger of misidentification of a photograph, even under the best of circumstances. This danger is greatly increased when the photograph is placed in a photo spread in such a manner that the witnesses' attention is drawn to it because of its size, color

placement or other distinguishing mark. Thus while the Court recognized that use of photo spreads was necessary in police work, it held that a conviction based on an in-court identification following a pretrial identification would not stand if the photo spread was so unduly suggestive as to foster "a very substantial likelihood of irreparable misidentification." 390 U.S. at 384, 88 S.Ct. at 971. Cases following Simmons have therefore followed a two-step formula in determining the admissibility of an in-court identification based on an out-of-court photo spread: "... (1) whether the procedures followed were 'impermissibly suggestive', and then (2) whether, being so, they created 'a substantial risk of misidentification'". United States v. Henderson, 489 F.2d 802, (5th Cir. 1973).

With a time interval of 35 years, rather than days or a few weeks as in the typical criminal case, the threshold of what suggestibility becomes impermissible must necessarily be lowered. The court cannot find a decision considering the question with a time lag of many years' duration. The Supreme Court did observe in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972) that a lapse of seven months between the event and the confrontation "...would be a seriously negative factor in most cases." Id. at 201; Id. at 383. In the instant case where there is a gap of almost 35 years between the event and the witnesses' ability to observe the suggestive photo spreads, the photo spread should have been as clinically impartial as humanly possible to construct.

Prior to giving testimony in this trial, each survivor-witness was interviewed in Israel by the Israeli police concerning events at Treblinka. Each was shown a group of photographs and asked if they recognized anyone.

The photo spread (Government's Exhibit 17) was prepared by Maria Radwiker, an Israeli attorney who worked as an inspector investigating Nazi crimes from Janury 1965 until her recent retirement in January of this year. She showed only the first three pages

of the photo spread to witnesses Turowski and Czarny and all six pages to Kohn. Mr. Boraks was shown only page 3 of the exhibit, Ms. Radwiker's successor, Martin Kolar, showed witness Lewkowicz pages 2 and 3 of the exhibit and only page 3 after a three hour interview to witness Epstein.

Only two of the photographs of the photo spread are claimed by Ms. Radwiker to be guards who were at Treblinka -- #16 and #17. Page 3, which was shown by itself to several of the witnesses, contains 8 photographs, numbers 10 thru 17. Not only is each of the first six smaller than either #16 or #17 but each is also blurred, shadowed or otherwise indistinct. By contrast, photographs #16 and #17 are both much larger than the other photographs and are the only clear ones. Not only is defendant's photograph larger than the others but it is also unnecessarily so: along each side is a superfluous black border approximately one-half inch in width. At the very minimum, it should have been trimmed to reduce the size of the picture.

A review of the first two pages reveals more blurred or otherwise indistinct photographs. The only one with any clarity is #9, and it is smaller and less clear than either #16 or #17.

All six of these witnesses escaped from Treblinka during the uprising on August 2, 1943. Several of the witnesses had trouble identifying defendant's photograph in the sense that it took one to five minutes to do so. For example, Boraks took one to two minutes to identify photograph #17 although he had looked at the same photo spread in an interview earlier that same day where the investigators were investigating #16; witness Epstein looked at the picture four to five minutes after a three-hour interview and identified the person as a zugwachmann but couldn't remember his name. Turowski testified that he immediately recognized the person in picture #16 (not Fedorenko). Ms. Radwiker indicated to him that #17 was Fedorenko and asked if he recognized Fedorenko; Turowski testified that after awhile he came to the conclusion he recognized him.

The Government only asked the first three of the witnesses to identify defendant in the courtroom, a subject which will be discussed in detail subsequently.

Kolar testified that in Israel the showing of three photographs is sufficient and Ms. Radwiker defended her manner of presentation of the photo spread as "my method."

Considering all circumstances surrounding the photo identifications, it seems clear that the makeup of the photo spread in this case is impermissibly suggestive. There was no reason at all for the Israeli investigators to set up the photo spread in the suggestive manner in which it was done. Perhaps the explanation given by Mr. Kolar that only three photographs are required in Israel provides the answer to why it was done in this fashion. However, the photo spread simply does not pass muster under American law.

The court must conclude not only was the photo spread impermissibly suggestive but it also led to a substantial act of misidentification for the three witnesses who attempted courtroom identification. It also tainted testimonal identification of defendant, critical because of the serious question whether the survivor-witnesses were describing defendant or another Russian at Treblinka.

COURTROOM IDENTIFICATION OF DEFENDANT

Turowski, the first-survivor witness, was asked to identify defendant in the courtroom on direct examination. He stood up in the witness stand and looked around the courtroom for forty seconds. Then Government counsel asked if the witness could come down from the witness stand to make an identification, if possible. The witness stepped down from the stand and took only one minute to make an identification of a middle-aged spectator sitting

in the last row of the courtroom.[16] Apparently sensing from the crowd reaction he had blundered, the witness backed away from the gentleman he had identified, then moved around the courtroom and in exactly another minute identified defendant.

The courtroom is square, approximately 40 feet to a side. Defendant sat approximately 22 feet from the witness stand, with his lawyer and associate, ages 30 and 26 respectively and translator, under 30. At the Government's counsel table sat four lawyers, whose ages ranged from 31 to 36.

The second witness Kohn never once looked at the spectators' section when asked to identify defendant in the courtroom. At this point the court became quite suspicious that Federal Evidence Rule 615 excluding witnesses, invoked by defendant at the beginning of the trial, was being violated. The court had given the instruction that witnesses were not to discuss the case among themselves. Kohn scanned only the counsel tables and easily identified defendant -- not exactly a difficult task in view of defendant's age being twice that of any of the other seven persons at the counsel tables.

Czarny's performance at the witness stand was almost a carbon copy of witness Kohn in the identification of defendant, with the exception that Czarny was more theatrical.

Mr. Boraks was not asked to identify defendant and responded to questions by talking directly to his translator. His translator was located on the side opposite from defendant's location. Exactly eighteen minutes after he took the witness stand Boraks quickly turned more than 90 degrees to look directly

[16]Turowski and each of the six survivors at Treblinka also testified at a trial in Dusseldorf in 1965 against 11 SS personnel. Most also testified in Dusseldorf in 1970 against Stangl, the Commandant at Treblinka. The court noticed that, according to the news article carried in the Miami Herald, May 31, 1978, describing Turowski's error, at the Dusseldorf proceedings the German court would locate defendants among the spectators in order to test the identification ability of the witnesses.

at the position where defendant was sitting and without ever scanning the courtroom he quickly looked back to the interpreter.

The court was convinced the witnesses were discussing the trial among themselves, at least; and at worst someone was coaching them. Defense counsel had made the motion to sequester witnesses at the beginning of the trial but had not objected to Ms. Radwiker remaining in the courtroom and sitting directly behind Government's counsel table after she had finished her testimony. Defense counsel now insisted the rule be enforced and that she be excluded from the courtroom; the court enforced the motion and excluded Ms. Radwiker from the courtroom for the remainder of the trial.

The in-court identification of defendant by the three witnesses would have been rather weak under any circumstances because of the obvious location of defendant (obvious except to Mr. Turowski) and the great difference between his age and that of the other seven persons at counsel tables plus defendant was the only one with a translator. However, because of the obvious discussion of the case by the witnesses in violation of the rule, the court rejects the in-court identification in toto.

IDENTIFICATION OF DEFENDANT

In additon to the grave identification deficiencies of the Government's case, there are many other grave flaws in the identification testimony of the Government's witnesses as well as the credibility problems. Perhaps it is understandable that there are flaws in identification evidence after 35 years. That is part of the difficulty the Government faced in trying to meet its burden of proof. Among the more obvious identification flaws: Turowski described defendant as "slightly Chinese-looking". However, defendant Fedorenko simply does not look Oriental. He doesn't now and he didn't in the picture attached to his visa application.

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Kohn described defendant as "mean-looking", and when he walked around the courtroom there was the same "mean-looking" face. That was his explanation for being able to identify defendant in the courtroom.

Czarny testified that he could identify Fedorenko when he walked around the courtroom because there was the "same mean-looking face". After the two days of testimony in Connecticut before beginning the Fort Lauderdale portion of the trial, and also at the close of all the testimony, the court concluded that defendant had a kind-looking, not hard-looking face, somewhat courtly in appearance. In no way can this court conclude he has a mean-looking face at this time.

Czarny also emphatically identified defendant's exhibit #3 as Fedorenko and announced he could never make a mistake. Of course the photograph was not Fedorenko.[17] Boraks identified Fedorenko as being the only Soviet guard who wore black, completely contrary to the testimony of all the other witnesses about the uniforms worn by the Soviet guards. Witness Lawkowicz quickly looked away after the only incident when she described the atrocity allegedly committed by Fedorenko.

[17]Czarny exhibited a number of other credibility flaws. He would become more theatrical when he was aware the court was watching him closely. His facial expressions would become more dramatic especially during his courtroom identification of defendant and his testimony after lunch on re-direct about his previous mis-identification of exhibit #3 as being Fedorenko. Further, the witness clearly understood a number of questions in English but specifically denied any knowledge of understanding the English language, even to the court. This despite answering questions on more than one occasion without the benefit of a translator. One of those questions contained more than ten words. Witness Epstein also obviously understood English but denied it (also to the court) although his knowledge may not have been as extensive as Czarny's.

Epstein talked for over three hours in the interview with Israeli investigator Kolar but never mentioned anything about Fedorenko. He had trouble in identifying Fedorenko even from the suggestive photo spread. In addition to the inability to remember the alleged shooting of his hometown friend, whom he claimed was his stretcher-bearer partner, he was squirming when he realized he had blundered into an indefensibly inconsistent description of the event. His testimony against Fedorenko simply lacks credibility.

Fedorenko's cross-examination perhaps supplied the missing piece in the puzzle when the Government's counsel persisted in asking defendant to describe his zugwachmann Rohoza. Fedorenko testified that Rohoza was "just like me" in height and his hair color was "just like mine." The persistent questioning about Rohoza's appearance elicited this response: "... like my face, almost like my brother." And to a further question, that the resemblance between the two was such they looked like brothers. The court watched Fedorenko even more closely than usual when that line of questioning began and the court is firmly convinced that the answers were given guilelessly. From observation of his testimony and demeanor the court concludes defendant is unsophisticated -- and perhaps feeling some effects of being in his eighth decade (e.g., see p. 1419 of transcript). The court doubts defendant is aware at this time of the exculpatory nature of the answers.

At the close of cross-examination the court asked questions of defendant for 50 minutes. Although defendant denied committing the atrocities during direct-examination, the court wanted the key answer from defendant face-to-face without the necessity of any translation. Confident that its location in the questioning would not favor or disfavor defendant and confident that defendant understood the question completely, the court instructed the translator to ask the question whether defendant had done any of the shooting and beating of prisoners as testified to in the courtroom and instructed defendant to "Please look at me, tell me either nyet or da, did you?"

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From about 10 feet away with unobstructed eye contact defendant's answer was sincere and strong: Nyet.

The court considered the answer credible.

Even without defendant's testimony, the Government's evidence on the claimed commission of atrocities by Fedorenko fell short of meeting the "clear, convincing and unequivocal" burden of proof. In fact, the court should have granted a motion for involuntary dismissal on those particular counts at the close of the Government's case. With defendant's testimony the Government's evidence fell woefully short of meeting the burden. The evidence left the court with suspicions about whether defendant participated in atrocities at Treblinka but they were only suspicions.

EXONERATION TESTIMONY BY RUSSIAN WITNESSES

At the beginning of the Fort Lauderdale proceedings, defendant filed a motion for continuance claiming that there were six witnesses in Russia who could give exculpatory testimony. Defense counsel asserted that defendant had just brought these matters to counsel's attention because of his difficulty in communicating with defendant about the nature of the charges.

Defendant has been back to the Soviet Union three times in the 1970's: once in 1972 "as a tourist"; again in 1973 for approximately three months and in 1975 for a period of 50 weeks. In late September or early October of 1973, several weeks before his departure from the Soviet Union in November, defendant asserts the Soviet Union investigated him at some length concerning his status in World War II and activities at Treblinka. A Russian Colonel asked questions of him on three different days, for a period of six hours on one occasion. The only other witness he saw was a witness named Kuzmienko who was only interrogated for five or ten minutes. He said the Russians came for him in a car and took him to the city of Siemferopol in the Crimea. He claimed that the Russian investigation cleared him of any wrongdoing and that they had taken statements of the

six persons, Nikolai Korotkey, Wasyl Wasylenko, Michael Dudnik, Petro Schelno, Ivan Schevchenko and Nikolai Rohoza, whose testimony he wanted to obtain for this trial. Defendant sought a continuance in order to obtain the testimony or evidence of these six persons, five of them guards at Treblinka as well as Rohoza, defendant's zugwachmann. The court urged both sides to begin immediately to obtain more information about the potential witnesses and the procedures available and necessary to obtain the evidence from them.[18]

[18]The court suggested that the most preferable means would be by an evidentiary hearing with the court sitting as a special master although that apparently is precluded at this point by the resolution of the Judicial Conference. Of course, this cannot be done without the approval of the Soviet Government; however, the Soviet Government has given permission for a West German court to conduct hearings in the Soviet Union of Soviet witnesses in connection with a West German trial of various defendants for alleged atrocities at Majdanek, Poland. See Miami Herald, May 28, 1978.

In view of the court's prior order virtually demanding the use of live witnesses from Israel rather than deposition testimony, the court felt it would be unfair to defendant if the obtaining of such testimony for defendant were to be limited to depositions or written interrogatories in presenting his corroborating testimony.

Next to an evidentiary hearing, the next most helpful means of presenting the evidence would be by video deposition but that possibility seems remote at best. Under the circumstances depositions by oral examination would have been the best feasible method and the least helpful would be depositions upon written interrogatories under letters rogatory. However, written interrogatories apparently are the only likely method of obtaining testimony from witnesses of the Soviet Union, per advice of the Administrative Office of the United States Courts which was communicated to counsel.

Of course, no fellow Russian or Ukrainian who was at Treblinka and now in the United States is about to come forward to testify. This is particularly true because the instant case reputedly is the first of many against East European prisoner-guards now in the United States. See, e.g., Miami Herald article, p. 1, dated July 20, 1978.

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At a post-recess hearing one evening after two weeks of trial and the Government not having rested its case, the court commented during colloquy on scheduling and the motion for continuance that it felt it was necessary in the interests of fair trial to give defendant an opportunity to present the testimony of these witnesses to corroborate his denial or claim of involuntariness. The court emphasized that it might be able to decide the case without the continuance but also recognized that, because of the uncertainty about obtaining testimony from the Russian witnesses, it might take years to obtain the testimony and decide the case.[19]

If the Soviet Government conducted an inquiry in 1973 and cleared defendant of any complicity in war crimes at Treblinka or of collaborating with the Nazis, such a proceeding would be interesting to muse about but it would not be admissible per se in an American court. The fact such an inquiry was held is indeed curious, particularly because defendant testified

[19]The court felt an announcement had to be made to counsel in order to obtain maximum haste on their part in getting the testimony or whatever evidence could be obtained from the Russian witnesses.

The spectators had left the courtroom by the time of the hearing, and that seemed an appropriate time for the court to make its comment. The court was aware that the Jewish Defense League members were in attendance in the courtroom as spectators; the court was also aware that, when an Administrative Law Judge announced a continuance to permit the Government to obtain more evidence in a deportation hearing in Baltimore of an alleged ghetto guard in Latvia, the Jewish Defense League had staged what can be described as a riot in the courtroom. See news article, p. 6E, Fort Lauderdale News dated Dec. 4, 1977.

The court was well aware of the emotional nature of the issues in this case and wished to assure the citizens in South Florida that any such continuances would not be one of indefinite duration even though it might take many months and perhaps well over a year. The court attempted to communicate that matter but the attempt was either misconstrued or too little, too late. The misinterpretation of the length of a possible continuance apparently stimulated the Jewish Defense League into printing and handing out leaflets by the following afternoon demanding the disqualification and impeachment of the trial judge.

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that amnesty was given by the Soviet Union in 1955. Edict on Amnesty for the Soviet Citizens Who Collaborated with the Occupying Powers During the Great Patriotic War 1941-1945, Vedomosti Verkhovnogo Soveta SSSR [official law gazette of the USSR] No. 17, at 345 (1955). Defendant volunteered this information. The court has concluded that it is not necessary to obtain the testimony of the Russian witnesses in order to decide the case.

POST-TREBLINKA

Following the uprising at Treblinka, Fedorenko and other Soviet prisoner-guards were transported by the SS back to Travnicki in different groups. One of the groups killed a German officer and fled after no other prisoner-guards would join them.

After a few days in Travnicki defendant was transported to Danzig with about 80 or so other prisoners, including Russians, Ukrainians, Byelo-Russians and Poles. Defendant served there as a guard for approximately eight months; the camp at Danzig was not a death camp. Defendant was then transferred to Poelitz, a prisoner-of-war camp where many prisoners died from starvation. At Poelitz he was used as a guard but never left the camp; defendant claimed the Germans didn't trust him and the others who were transferred to Poelitz, probably because the Russian army was getting closer. After five or six months at Poelitz defendant was transferred to Hamburg where he was assigned to guard produce and warehouses. After a short period of time the British occupied Hamburg; defendant worked for the British from 1945 to 1949.

In Hamburg defendant had a work uniform and an after-hours uniform. He described better conditions under the British: he received good food and 100 marks per month.

In 1945 the prisoners of the British were required to register and defendant listed his birthplace as Sarny, Poland because every Russian citizen had to return to the Soviet Union.

He selected the town of Sarny because some friends suggested it. Defendant used his correct name and birth date on the registration, visa applications and relevant documents for naturalization.

The testimony of a fellow-inmate of the camp in Hamburg indicates there were about 1,000 persons there; all were Polish except 200 to 300 Russians, mostly Ukrainian, and the camp was supervised by Polish officers. When Russian investigators came seeking Russians for repatriation, Polish officers protected the Ukrainians and Soviet residents by advising the Russians that all residents of the camp were Polish.

Defendant feared repatriation as did the other Soviet citizens at the camp. One witness testified that thousands committed suicide rather than be repatriated to the Soviet Union.[20]

[20]Defendant requested a continuance in the third week of trial in order to produce a witness who could testify that many Ukrainians committed suicide, including death by immolation, rather than suffer repatriation. The court rejected the motion for continuance on the basis the evidence would be merely cumulative.

While residing at the displaced persons camp at Osdorf near Hamburg, defendant applied for an immigration visa giving his correct name and date of birth, listing his place of birth as Sarny, Poland. In his history, considered by the Displaced Persons Commission, the same information was given together with some additional information: that he was a member of the Greek Orthodox faith and received his education at Sarny consisting of elementary school from 1915 to 1918. In addition he contended he was a farmer at Sarny until March 1942 when he was deported to Germany and employed as a worker at Poelitz.[21] A typist who evidently spoke English but not German mistakenly typed Pelez rather than Poelitz in both places it appears on the Displaced Persons Commission report. Clearly a German location could not be spelled Pelez and the court must presume that the case analyst and reviewing persons on the Displaced Persons Commission and, more importantly, the reviewing Vice-Consul knew Poelitz was a German location, particularly because it was identified as being "near Stettin." Jenkins testified vice-consuls received several months of German language training.

[21]Poelitz is spelled with an umlaut in German, viz., Pölitz. It is located slightly less than 10 miles (15 kilometers) north of Stettin, per National Geographic Society map of Germany (1944). Inasmuch as Poelitz and Stettin have been situated in Poland since World War II, it is difficult to locate Poelitz by the German spelling in most atlases. However, see p.50 of Rand McNally's International Atlas (1969) which lists both German and Polish spellings. The name is spelled incorrectly in the transcript.

The court located a village named Pehlitz in East Germany. It is apparently too small to be listed even in detailed atlases. Its co-ordinates place it twenty miles closer to Berlin than to Stettin. From the evidence the court concludes Poelitz is the location referred to in the Displaced Persons Commission report.

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Defendant's application for a visa was executed before the Vice-Consul on October 12, 1949 at the Consular office at Wentorf near Hamburg. He was approved by the Vice-Consul for admission to the United States under the Displaced Persons Act and arrived in America on November 5th, 1949, and went to work on a farm in Litchfield, Connecticut. Unfortunately, and inexplicably, the Government did not find the Vice-Consul who approved defendant's application.

On November 21, 1950 defendant filed a Declaration of Intention listing his birthplace as Sivash in the Ukraine. The same information is provided in his Declaration of Intention filed April 7, 1951.

The Government called Kempton Jenkins, a career foreign service officer as an expert witness; he was formerly a Vice-Consul reviewing Displaced Persons cases in south Germany subsequent to the time defendant came to America. Although the witness was a very engaging person, the court found a number of inaccuracies in his testimony and must therefore consider his testimony in the light all the evidence.

Any Vice-Consul had a number of materials presented to him by an applicant for a visa. At that point the applicant had been interviewed by a voluntary sponsoring group (in defendant's case the Tolstoy Foundation) and by the Displaced Persons Commission. The Vice-Consul had a report from the Displaced Persons Commission as well as one from the Army CIC (Counter-Intelligence Corps) which checked any service record with the Axis forces. In addition, a report on conduct from the local German police was furnished together with any report from the Berlin Depository Center which contained a depository of Nazi party documents.

If a prisoner indicated he was with a labor force a check was made of the records as to that labor force. In the instant case, defendant did advise them he had been at Poelitz.

Jenkins testified that the persons to be excluded under the Displaced Persons Act were ones who participated in or acquiesced in crimes against humanity or against civilians or served voluntarily with Axis military forces. He stressed that the benefit of the doubt was to be given to the applicant and the objective was to make a humanitarian solution. He testified that many applicants were members of the East European Waffen SS (combat) divisions who claimed to be serving involuntarily. The Vice-Consul would have to decide whether to admit the applicant and testified the tendency would be to make a favorable judgment and admit the applicant. He testified that the Displaced Persons Commission and Vice-Consuls recognized that many East Europeans hated the Russians as much as they did the Germans. He also added the fact the Russians might execute the applicant was a reality that was considered. He acknowledged that some visas were granted to members of General Vlasov's army (The "Army of the Damned"), although that Army fought side-by-side with the Germans against the Russians and comprised Soviet volunteers.

Jenkins testified he knew of no camp guards whose applications were favorably processed but he admitted he only remembered three and his experience was with Dachau which was located in Southern Germany. He assumed the camps east of Germany, such as Treblinka and Sobibor, located to the east of Warsaw, would be more brutal because the German civilian population was less likely to learn of it. He also testified that thousands of Germans who were not Jewish were killed in concentration camps. The survivors' testimony about Trablinka indicates that only Jewish persons were exterminated there plus a few gypsies.

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Jenkins' testimony about the structure of the death camp organization was hardly expert and conflicts consistently with other evidence presented at the trial. For example, he testified that the Ukrainian guards had the same uniforms as the SS with only sightly different insignia. However, the unanimous testimony was the Germans wore their usual gray-green uniforms but the prisoner-guards didn't. He testified that the camp guards could get leave and get away from the camp and could transfer. The testimony was clear that they could not take leave (and go to Berlin, as Jenkins opined) but could only get a two-to-four-hour pass to visit a small village a couple of miles away.

The testimony of defendant refutes the assumption that the camp guards could transfer to other duty. Jenkins also testified that the Germans commandeered all the best houses and the camp guards had excellent living conditions, had movies and were well-fed. There was no evidence about the quality of the meals or about movies in the camp but Soviet prisoner-guards lived in barracks rather than in "the best houses".

Jenkins also would have considered the kapos as excludable because they assisted the Germans. This is totally contrary to the reaction of every witness who survived Treblinka; each of the Israeli witnesses testified the kapos did only what they had to do and the witnesses were quite indignant when asked if they had ever testified against the kapos. The witnesses replied that there was no reason to do so. In addition, Jenkins speculated that the kapos were probably shot in 1945 during a period of retaliation, but the testimony was to the contrary.

The Constitution of The International Refugee Organization described in part II of Annex I "Persons who will not be [considered as displaced persons]." Under the second listing are two classifications:

> 2. Any other persons who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

It has troubled the court that the word "voluntarily" appears in connection with service with the Axis military forces but is deleted from the phrase in section 2(a). The concern arises because the traditional principles of statutory construction would hold that the deletion of the word "voluntarily" in one subsection while its inclusion in another compels the conclusion that any assistance, whether voluntary or involuntary, in connection with concentration camp treatment of civilian population would be sufficient to bar that person from being entitled to relief under the Displaced Persons Act. The difficulty with that construction is that it would bar every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp. Each did so involuntarily and under the utmost duress. For example, working prisoners led arriving prisoners to the lazaret to be executed; or wore armbands as part of the ruse at the lazaret; or cut the hair of the females to be executed; others played in the orchestra at the gate as part of that ruse, etc. Technically, this is assistance. It is also absurd to deem their conduct as "assistance or acquiescence" inasmuch as it was involuntary -- even though the word "voluntarily" was omitted from the definition.

The Government listed witnesses who were Treblinka survivors and now reside in America, presumably as U. S. citizens. To interpret "assistance or acquiescence" without requiring it to be done "voluntarily" could imperil their status.

The Government's expert witness, Mr. Jenkins, opined that he would bar kapos from the benefits of the Displaced Persons Act because of their assistance to the SS in supervising the activities of the other Jewish prisoners. Unanimously the survivors of the Treblinka prison camp defended the actions of the kapos. They pointed that the kapos had administered beatings at the command of the SS with just enough strength to avoid getting themselves into trouble with the SS while not being severe enough to injure the prisoner. Here again, if the word "voluntarily" is not read into subsection 2(a) kapos also would be denied admission under the Displaced Persons Act.

To construe the definition in that fashion would be to thwart totally the most obviously deserving persons: the prisoners who survived death camps such as Treblinka.

WAS FEDORENKO'S GUARD DUTY VOLUNTARY?

The court has previously found Fedorenko did not volunteer to go to Travnicki and did not volunteer to be a guard at Lublin or Treblinka. Nor did he volunteer for Warsaw, Danzig, Poelitz or Hamburg.

The question still remains whether Fedorenko could have made some feasible choice other than serving as a guard, particularly at Treblinka. The court has already found that defendant could not have transferred to another division.

Fedorenko had rights that the typical prisoner of war does not have, for example: carrying a rifle and a pistol, being able to go on liberty for four hours and even being given some small stipend from the Germans. On the other hand, he clearly did not have the right to walk out of the gate, go to a city of his choice, or catch a train to his home or wherever else he wanted to go. Although not a typical prisoner of war, he was clearly not one of the captors. He was in some limbo state of having privileges not usually conferred on a prisoner of war but still in a position where disobedience of any consequence or an attempt to escape would certainly result in death.

The privileges given to the Soviet prisoner-guards apparently were to mollify them enough to prevent disciplinary problems and also to prevent their revolting against their captors. The use of liberty for four hours to visit a nearby town seems calculated to keep the prisoner-guards contented while preventing their getting a safe headstart if they decided to escape. Defendant testified that four of them did try and were surrounded by the Germans in a house and apparently executed. Approximately 15 prisoner-guards attempted to escape from Treblinka and defendant was unaware of what happened to them other than the four. One prisoner-guard was executed for disobedience and all the prisoner-guards were compelled to watch.

At the time of the uprising on August 2, 1943 defendant and the other prisoner-guards near him fired over the heads of the prisoners under orders from the Commandant[22]. Defendant did not fire at any of the prisoners and the court doubts that he did anything other than shoot over their heads.

[22]When asked on cross-examination why he didn't shoot the commandant, he replied: "If you shoot the commandant, it is like shooting yourself."

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With the benefit of hindsight seated in a comfortable chair in an air-conditioned office it would be relatively easy to conclude that defendant should have turned his rifle on the SS on the day of the uprising or that he should have attempted to escape once he got to the nearby village. Defendant testified he discussed escape once with a fellow prisoner-guard but nothing further came of it.

However, the Code of Conduct for Members of the Armed Forces of the United States Imposing a Duty to Escape (Section III) was not promulgated until Executive Order No. 10631 dated August 17, 1955, after the Korean conflict. Previously with American military forces there had been only an unwritten tradition to escape although apparently a written duty was once published in 1863. No evidence was presented that defendant was under a Soviet duty to escape or that he had been so instructed in the few, presumably disorganized, days between Russian mobilization and his capture.

If Fedorenko had refused to carry out orders at Treblinka, there is little doubt from the evidence that his execution would have been swift and sure. It no doubt would have occurred before a formation of other prisoner-guards to serve as an example to them. For a prisoner-guard at Treblinka to have denounced publicly the SS and what they were doing there would indeed have been a dramatic act of decency. It also would have been a dramatic act of self-destruction. As a court of equity, this court cannot impose such a duty upon defendant.

CONCLUSIONS OF LAW

Based on the findings set forth the court now considers each count of the complaint.

There is no dispute that defendant lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany. This misrepresentation would have been cause to deny defendant's application for citizenship. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 87 S.Ct. 666 (1967), In Re Petition of Maniatakis, 376 F.2d 728 (3rd Cir. 1967). However, in a denaturalization

proceeding a different standard obtains. Despite the fact that the immigration laws prohibit giving of false answers[23] and that therefore any misrepresentation is "illegal", once citizenship has been confirmed it may be taken away only if it can be clearly and convincingly shown that the misrepresentation was "material" Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147 (1960). Although Chaunt considered only the question of obtaining citizenship through "willful misrepresentation of a material fact", the court finds that the standard must be the same where the charge is "illegal procurement" by virtue of a false statement. See In Re: Field's Petition, 159 F. Supp. 144 (S.D.N.Y. 1958).

In Chaunt the Supreme Court held that proof of materiality requires clear and convincing proof that either (1) facts were suppressed "which, if known, would have warranted denial of citizenship" or (2) that their disclosure "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" 364 U.S. at 355, 81 S.Ct. at 149.

In the instant case the true facts regarding defendant's birthplace and nationality would not of themselves have justified denial of citizenship, for Ukrainians per se were not excluded under the Displaced Persons Act.[24]

[23]The Act of May 22, 1918, as amended 40 Stat. 559, §1(C) as in effect in 1949 prohibited the giving of any false statement in an application for permission to enter the United States. A similar provision in the current law may be found in Title 8 U.S.C. §1325.

[24]Displaced persons under the Act included any person who as a result of the actions of the authorities of Nazi or Fascist regimes, has been deported from or has been obliged to leave his country of nationality or of habitual residence. This definition would include Ukrainians who were forced from their homeland during the German invasion of the U.S.S.R.

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Neither can the court conclude that the disclosure of these facts might have been useful in an investigation leading to the discovery of other facts possibly warranting denial of a citizenship. In fact, the truth regarding defendant's nationality and birthplace were revealed to the Government when defendant filed his Declaration of Intention in 1950 and again in 1951. Mr. Zimon, who interviewed defendant pursuant to his application for citizenship, testified that the disclosure of the previous false statement was not a cause for concern or further inquiry because it was a well known fact that many Ukrainians entering the country at that time had concealed their true nationality in order to avoid repatriation to the U.S.S.R. Further, Mr. Jenkins admitted defendant's being a Ukrainian was obvious from his name and religion.[25]

However, the question of defendant's whereabouts from 1942-1945 presents another matter. Defendant has admitted that he did not work in a factory in Poelitz, but instead worked as a prisoner-guard for ten months in Treblinka. However, he did serve as a prisoner-guard at Poelitz. If the Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission under Section 2(a) or 2(b) of the Displaced Persons Act. However, the knowledge of defendant's being at Poelitz whether as a forced laborer or a prisoner-guard would have triggered the search of the records as well.

[25]Accord, and almost on all fours except it is an application rather than a denaturalization case: In Re Iwanenko's Petition, 145 F. Supp. 838 (N.D. Ill. 1956). Iwanenko came to U.S. in 1950 after defendant's arrival and the case describes the fear of repatriation in detail. Jenkins claimed there was no repatriation as late as 1949 and no reason to fear it. However, the Iwanenko opinion described how rumors were still circulating among Russian nationals. Of course, defendant listed Sarny, Poland as his birthplace in 1945 when repatriation was unquestionably a peril and he was consistent in his 1949 application.

The Government has argued that under Chaunt it is not necessary to prove that the facts which would have been revealed through the investigation would have required denial of citizenship; the Government contends it is sufficient that the conceded facts prevented the Government from making an investigation which might have resulted in a denial of citizenship.

The language in Chaunt is ambiguous. The word "possibly" in the phrase "possibly leading to the discovery of other facts warranting denial of citizenship" could be read to modify the entire phrase, thus supporting the Government's interpretation that existence of facts warranting denial of citizenship need only be a possibility. However, if this were the intent of the Court, it would have been clearer to state "facts which might warrant denial." On the other hand, it appears that the proper grammatical interpretation is that "possibly" modifies only the first part of the phrase, meaning that the existence of facts justifying denial is presupposed, and the only question is whether the suppressed facts would have provided a link to their discovery.

This second interpretation has been adopted in two circuits. In United States v. Rossi, 299 F.2d 650 (9th Cir. 1962), the court considered whether the fact that defendant had personated his brother, a Chilean citizen thereby suppressing his true identity as an Italian, was material. The court found that although defendant thus succeeded in avoiding the quota restriction placed on Italians, the Government had not shown that defendant would not have been admissible because the quota had been filled, and the Government therefore had not met the burden of showing that the misrepresentation was material.

The Ninth Circuit more recently adhered to this same interpretation of Chaunt in holding in a deportation case that a suppressed fact is not material unless the truth would have justified denial of a visa. LaMadrid-Peraza v. Immigration and Naturalization Service, 492 F.2d 1297 (9th Cir. 1974).

Similarly, in United States v. Riela, 337 F.2d 986 (3rd Cir. 1964) the court cited Chaunt as holding that false statements are material if they resulted in the suppression of facts which if known would have warranted denial of citizenship.

Based on its reading of Chaunt, this court agrees with the interpretation followed in the Third and Ninth Circuits. The case of Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) cited by plaintiffs, is not a denaturalization case and therefore is inapposite. Compare: Nowak v. United States, 356 U.S. 660, 78 S.Ct. 955 (1958) with Berenyi v. District Director of Immigration and Naturalization Service, supra. Therefore the court must determine whether the Government has presented clear and convincing proof that the true facts would have warranted denial of citizenship.

APPROVAL OF DEFENDANT'S VISA APPLICATION

Witness Jenkins testified that a Vice-Consul's determination to approve or disapprove an application could only be overruled by the Consul General, and that overruling didn't happen. If anything in an application indicated prior service in a labor battalion or German unit there would be an investigation made to see if applicant served voluntarily.

Although defendant did not mention Treblinka in his history given to the Displaced Persons Commission he did mention his service at Poelitz near Stettin although he described it as a factory worker rather than a prisoner-guard. The case analyst signed off on the Displaced Persons Commission report on August 30, 1949. It was more than six weeks later on October 12, 1949 when the Vice-Consul at Hamburg approved defendant's application for a visa.

What happened in the intervening time? Was no inquiry made into the German records about Fedorenko being in whatever units were at Poelitz? Unlikely -- Jenkins testified such information would have triggered an inquiry. Did the inquiry show his status there? If so, did the Vice-Consul apply the test that Jenkins had described, resolving the doubts to the benefit of the applicants? After all, doubts were resolved in favor of members of General Vlasov's army and their applications were approved. We can't be sure because the Government did not produce the Vice-Consul to testify. Not only were the doubts often resolved in favor of applicants under the Displaced Persons Act, but the Supreme Court instructs the United States Courts to resolve the law "as far as is reasonably possible" in favor of the naturalized citizen. Schneiderman, 320 U.S. at 122, 63 S.Ct. at 1335. Therefore this court must resolve the doubt in favor of defendant as to Counts 1, 2 and 3. This court specifically holds that petitioner lawfully entered the United States.

Count 4 of the complaint charges defendant with giving a false answer to question #6 on the application form for citizenship (form N-400). That question asks "Have you ever committed any crime, whether or not you were arrested? Inasmuch as the court has determined that the Government has failed to prove defendant's commission of any crimes, it cannot be said that defendant's answer was not truthful. Therefore the Government has failed to meet its burden as to Count 4.

Turning now to Count 5, question #7 asked defendant to list membership in any organizations, including foreign military service. Defendant listed only Russian military service in 1941. Mr. Zimon, the naturalization examiner who used red markings to indicate his additions, added "labor union at work" as an organization of which defendant was a member.

( )

The Government contends that defendant willfully failed to reveal his status as an armed guard for the Germans[26] in response to the question.

It is clear that defendant served only in the Russian army until his capture in 1941. Defendant has maintained that he was a prisoner of war until his surrender to the British. It is clear that he was transported from place to place and was obliged to obey orders under penalty of death and was not free to do whatever he chose. In view of the evidence the court concludes that there would be strong reason in defendant's mind to view himself as a prisoner of war; it therefore cannot be said that his omission was wilful. United States v. Tooma, 187 F. Supp. 928 (E.D. Mich. 1960), United States v. Profaci, 274 F.2d 289 (2d Cir. 1960). Even if defendant clearly understood the question and wilfully concealed the truth, the court must necessarily hold in accordance with the previous findings that the false answer was not proved to be material.

Counts 6 and 7 charge defendant with not being a person of good moral character for the five years preceding naturalization both because of the commission of atrocities and because he lied on his N-400 form.

[26] The complaint originally charged defendant with being a member of the German Army. It was amended at the pretrial conference.

Good moral character is a difficult term to define. As the Supreme Court has stated, "the term, by itself is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitude, experience and prejudices of the definer". Konigsberg v. State Bar of California, 353 U.S. 252, 263 (1957). Thus it has been consistently held that to meet the requirements for citizenship a petitioner's character must measure up to that of the average citizen in the community in which he resides. Brukiewicz v. Savoretti, 211 F.2d 541 (5th Cir. 1954). Although the immigration laws require proof of good moral character only for the five years preceding naturalization[27] conduct outside the statutory period is relevant and should be considered.[28]

The evidence concerning Fedorenko's good conduct for 29 years in America is uncontroverted. In contrast, the evidence concerning defendant's conduct at Treblinka is fraught with conflict and uncertainty and is therefore inconclusive.

While it may be true that defendant was not completely candid in his interviews with Immigration officials, and that such "temporizing with the truth" should not be condoned, the court cannot find under the circumstances that defendant was guilty of the type of willful deceit which alone might justify a revocation of citizenship. It must be again emphasized that the burden is no longer on defendant to demonstrate his entitlement to citizenship. Berenyi, supra, but is on the Government to show clearly and convincingly that he is not. Chaunt, supra. The court therefore concludes that the Government has not met its burden as to Counts 6 and 7 of the complaint.

[27] §316(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. §1427(a).

[28] §316(e), 8 U.S.C. §1427(e) provides that the court may take into consideration as a basis for its determination the petitioner's conduct and acts at any time prior to that period.

THE EQUITIES INVOLVED -- AN ALTERNATIVE BASIS FOR THE HOLDING

Even if the court were to find that defendant had willfully concealed material facts in applying for citizenship, the court's inquiry would not stop there. This denaturalization proceeding is a suit in equity, Knauer v. United States, supra, and equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just.

The authority of the Government to take away citizenship fraudulently or illegally procured has repeatedly withstood constitutional challenge. See Johannsen v. United States, 225 U.S. 227, 32 S.Ct. 613 (1912); Schneiderman v. United States, supra; Luria v. United States, 231 U.S. 9, 34 S.Ct. 10 (1913). Moreover, this right is ordinarily not subject to defenses of laches, Costello v. United States, 365 U.S. 265, 81 S.Ct. 534 (1961), estoppel, United States v. Mess, 245 U.S. 319, 38 S.Ct. 118 (1917) or res judicata, Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613 (1912). Of course, this does not mean that the Government's power to bring suit is not subject to any limitations. The grant of citizenship confers on the individual all the rights and privileges guaranteed by the Constitution, and the Government may not revoke that grant on the grounds that are arbitrary, punitive or discriminatory. See Schneider v. Rusk, 377 U.S. 163, 84 S.Ct. 1187 (1964); Rogers v. Bellei, 401 U.S. 815, 71 S.Ct. 1060 (1971).

The Supreme Court has held on several occasions that a certificate of citizenship shall be cancelled unless there has been strict compliance with the conditions imposed by Congress as prerequisites to the acquisition of citizenship. See Maney v. United States, 278 U.S. 17, 49 S.Ct. 17 (1928); United States v. Mess, 245 U.S. 319, 38 S.Ct. 118 (1917); United States v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422 (1917).

However, court decisions in the area of denaturalization must be considered in light of the economic and social concerns of the times, as well as the unique facts of each case.

Early in this century Congressional concerns in the area of immigration law focused on the economic and social problems created by an influx of immigrants.[29] The Immigration and Naturalization Act of 1906 instituted major procedural reforms in the administration of the laws in an effort to curb the widespread abuses occurring at that time.[30] Thus many of the early denaturalization cases reflect the judicial concern for strict compliance with procedural requirements.[31]

During the war and post-war era of the 40's and 50's the cases take on a different posture, as the Supreme Court was faced with denaturalization suits in which the charge of illegality almost invariably was the claim that defendant was not "attached to the principles of the Constitution."[32]

[29]For a detailed outline of the history of the immigration laws see the Legislative History of the Immigration and Naturalization Act of 1952; reported at [1952] U.S. Code Cong. & Ad. News, 1653-1674; 1674-1682.

[30]See Gordon & Rosenfeld, Immigration Law & Procedure §20.1, 20-10 thru 20-11 (1975).

[31]See, e.g., U.S. v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422 (1917); U.S. v. Mess, 245 U.S. 319, 38 S.Ct. 118 (1917); Johannsen v. U.S., 225 U.S. 227, 32 S.Ct. 613 (1912).

[32]See, e.g., U.S. v. Schneiderman, 320 U.S. 118 (1943), Baumgartner v. U.S., 322 U.S. 665, 64 S.Ct. 1240 (1944), Knauer v. U.S., 328 U.S. 654, 66 S.Ct. 1304 (1946), Maisenberg v. U.S., 356 U.S. 670, 78 S.Ct. 960 (1958), Nowak v. U.S., 356 U.S. 660, 78 S.Ct. 955 (1958).

In this era the court was clearly concerned that citizenship not be revoked solely on the basis of one's political or ideological beliefs. Consequently the court began to exercise a virtually de novo right of review of lower court findings.[33]

Perhaps the most striking illustration of the scope of Supreme Court review is found in Nowak v. United States, 356 U.S. 660 (1957) where the court virtually dismissed the testimony of the witnesses and the findings of two lower courts. This case presents a startling contrast to the standards used in considering petitions for naturalization where the burden is on the petitioner. See, e.g., Berenyi v. District Director, Immigration and Naturalization Service, supra.

Similarly, the Court took a very hard look at the evidence in Chaunt v. United States, supra in order to conclude that the Government had not proven the significance of three minor arrests for membership in the Communist party, all omitted from defendant's application for citizenship.

In the late 50's and early 60's courts were faced with another category of cases as the Government began a program of seeking deportation of known or suspected underworld undesirables.[34]

Thus in Costello v. United States, 365 U.S. 265, 81 S.Ct. 534 (1961) the Court found no reason to apply the equitable principles of laches in favor of defendant.

[33]See Baumgartner v. U.S., 322 U.S. 665, 64 S.Ct. 1240 (1944).

[34]See Shaughnessy v. U.S. ex rel. Accardi, 349 U.S. 280, 75 S.Ct. 746 (1955). Among the cases which appear to be part of the Government's effort are U.S. v. Montalbano, 236 F.2d 757 (3rd Cir. 1956) affirmed sub. nom. Genovese v. U.S., 352 U.S. 952 (1956); U.S. v. Anastasio, 226 F.2d 912 (3rd Cir. 1955); Corrado v. U.S., 227 F.2d 780 (6th Cir. 1955); U.S. v. Oddo, 314 F.2d 115 (2d Cir. 1963).

A review of the Supreme Court decisions in denaturalization cases over the last few decades reveals no case in which the Court has been faced with the question of whether a district court has discretion to consider the equities in determining whether citizenship should be revoked after many years.

However, lower courts have exercised discretion in determining whether citizenship should be granted. For example in Petition of R., 56 F. Supp. 969 (D. Mass. 1944) the court considered whether citizenship should be denied petitioner on the grounds that she had committed the crime of adultery. Judge Wyzanski observed that with respect to the requirement of showing good moral character: "Congress seems to have invited the judges to concern themselves not only with the technicalities of the criminal law, but also with the norms of society and the way average men of good will act... ." Id. at 971. The court went on to hold that under the circumstances the certificate of citizenship should be granted.

Similarly, in In Re Bespatow, 100 F. Supp. 44 (W.D. Pa. 1951) the court considered whether a conviction of manslaughter barred petitioner from citizenship. After examining the circumstances of the killing and considering petitioner's good behavior for 37 years, the court held that citizenship should be granted. Some courts have subsequently interpreted Section 101(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1101(f) as a limitation on the court's discretion in determining good moral character.[35]

[35]Gutierrez-Sosa v. Del Guercio, 247 F.2d 266 (9th Cir. 1957); Petition for Naturalization of O ____ N____, 233 F. Supp. 504 (S.D.N.Y. 1964); In re C____ C____ J____ P____, 299 F. Supp. 767 (N.D. Ill. 1969).

It is clear that in defining the statutory criteria, the courts continue to exercise discretion in order "to ameliorate hardship and injustice which otherwise would result from a strict and technical interpretation of the law." Wadman v. Immigration and Naturalization Service, 329 F.2d 812, 817 (9th Cir. 1964). See e.g. In re Briedis, 238 F. Supp. 149 (N.D. Ill. 1965); In Re Edgar, 253 F. Supp. 951 (E.D. Mich. 1966); Flumerfelt v. United States, 230 F.2d 870 (9th Cir. 1956).

Additionally, in In Iwanenko's Petition, 145 F. Supp. 838 (N.D. Ill. 1958), a case similar in many respects to the instant one and containing extensive facts outlining the fear of many Ukrainians about repatriation to the Soviet Union, the court did not stop with a technical analysis of whether petitioner's entry had been lawful under the Displaced Persons Act. Instead, the court went beyond technicalities to consider the humanitarian purposes of the law and concluded petitioner should not be excluded from citizenship.

Perhaps the best example of a court's applying an equitable and non-technical interpretation of the law is United States v. Rossi, 259 F.2d 650 (9th Cir. 1962). In that case the defendant had assumed the identity of his brother, a Chilean, so that he could circumvent the quota restrictions placed on Italian immigrants. As in this case, the government there argued that "the facts misrepresented were material to lawful entry and that Rossi was guilty of fraudulently misrepresenting them." Id. at 652. The court conceded that, "[m]anifestly, [Rossi's] intention was fraudulent." Id. However, the court looked for more than a technical violation of the law. It considered the heavy burden of proof placed upon the government by the Supreme Court in Schneiderman and Chaunt, and held that there had been an insufficient showing that permission to enter the country would have been withheld had the true facts been known.

If discretion may be exercised in a petitioner's favor in naturalization cases where the burden rests on petitioner, then surely the court can consider equitable and mitigating circumstances in a denaturalization case where doubts are to be resolved reasonably in favor of the citizen.

From the evidence and observing defendant for nearly three weeks in trial, the court concludes defendant is an unsophisticated man with very little education who is not only willing but anxious to work. He also is a man who is not interested in "making waves" or causing trouble.[36] Unquestionably the Germans spotted these qualities in him and selected him for training as a guard.

If the court were convinced that the allegations charging defendant with atrocities at Treblinka were true, there is no doubt that defendant would not be entitled to citizenship in a country which prides itself on its adherence to principles of equality and human dignity, and whose citizenry largely comprises descendants of immigrants who sought refuge from political oppression. However, this court must decide this case on the record before it and the strict burden of proof has not been met.[37]

[36]The court agrees with the assertion of defendant's counsel that Mr. Fedorenko wants to please and on cross-examination would finally give the answers he thought would please the questioner if the questions were slightly changed and the subject matter approached from a different angle. Consequently, the court tended to discount the later answer[s] given on a series of questions on the same subject on cross-examination. Despite the waiver of rights and the presence of an interpreter the court discounted the statement given the Immigration and Naturalization Service two years ago. With defendant's difficulty in communicating and his tendency to volunteer information that is harmful to his interest there was a pressing need for assistance of counsel.

[37]Because the court has not found defendant committed the atrocities the Government claims he committed at Treblinka, it is not necessary for the court to confront the issue of whether sufficient duress was shown (or could be shown, in the eyes of the law) by defendant to excuse such conduct. If the court had found that the Government met its burden of proof in establishing that defendant committed the alleged atrocities at Treblinka, then it would have been necessary for the court to have granted a continuance in order for defendant to present testimony of the Russian witnesses he claimed could exonerate him.

The Court recognizes that "[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practised upon the court, without which the certificate of citizenship could not and would not have been issued" Johannessen v. United States, 225 U.S. 227, 241 (1911). Nevertheless, where defendant has been a responsible citizen and resident for twenty-nine years, and the record as to his conduct thirty-five years ago is inconclusive, the court finds that the equities should be weighed in favor of defendant. Neither is the equitable balance tipped against defendant by his answers in 1945 and 1949. He was a victim of Nazi aggression, fearful of repatriation, many years and many miles from a home he thought to be empty of his wife and children, and was longing for a chance in America.

Because the Government has failed to meet its burden of proof judgment is entered for defendant. Under the circumstances of this case equitable considerations would also require the same result.

DONE AND ORDERED this 25th day of July, 1978.

United States District Judge

cc counsel of record

MICROFILMED ON
ROLL NO._____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

FEODOR FEDORENKO

Case No. 77-2268-Civ-NCR

FINAL JUDGMENT

FILED: _____ cc

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Based on the findings of fact and conclusions of law contained in the court's memorandum opinion entered this date, judgment is hereby entered for defendant on all counts.

DONE AND ORDERED this 26 day of July, 1978.

United States District Judge

cc- counsel of record

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Exhibit B Opinion of Fifth Circuit Court

UNITED STATES of America, Plaintiff-Appellant,

v.

Feodor FEDORENKO, etc., Defendant-Appellee.

No. 78-2879.

United States Court of Appeals, Fifth Circuit.

June 28, 1979.

Government brought action seeking denaturalization of citizen on ground that he had lied in his application for a visa, particularly in not disclosing that he had served as guard at death camp during World War II, and on ground that he had participated in atrocities at the camp, precluding him from having good moral character necessary to become an American citizen. The United States District Court for the Southern District of Florida, at Miami, Norman C. Roettger, Jr., J., 455 F.Supp. 893, rendered judgment for defendant, and the Government appealed. The Court of Appeals, Wisdom, Circuit Judge, held, inter alia, that: (1) in a denaturalization case, the Government need not prove the existence of facts which, in and of themselves, would have justified denial of citizenship; rather, the second materiality test of *Chaunt* requires only that the Government prove by clear and convincing evidence that disclosure of the true facts would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship, and (2) the evidence before the district court clearly and convincingly proved that, had defendant disclosed his service as a guard at death camp while a German prisoner during World War II, the American authorities would have conducted an inquiry that might have resulted in denial of a visa to him; accordingly, defendant was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*.

Reversed and remanded.

1. Aliens ⇐71(18)

In a denaturalization case, the Government need not prove the existence of facts which, in and of themselves, would have justified denial of citizenship; rather, the second materiality test of *Chaunt* requires only that the Government prove by clear and convincing evidence that disclosure of the true facts would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

2. Aliens ⇐71(18)

In denaturalization case, the evidence before the district court clearly and convincingly proved that, had defendant disclosed his service as a guard at death camp while a German prisoner during World War II, the American authorities would have conducted an inquiry that might have resulted in denial of a visa to him; accordingly, defendant was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

3. Aliens ⇐71(9)

Immigration law does not allow a defense, in a denaturalization case, that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth.

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Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

4. Aliens ⇐60

A crucial distinction exists between a district court's authority to grant citizenship and its authority to revoke citizenship; in the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and civics, and the district court must be accorded some discretion to make these determinations; however, once it has been determined that a person does not qualify for citizenship, the court has no discretion to ignore the defect and grant citizenship. Immigration and Nationality Act, §§ 312, 316, 340, 8 U.S.C.A. §§ 1423, 1427, 1451.

5. Aliens ⇐71(1)

Denaturalization statute does not accord the district courts any authority to excuse the fraudulent procurement of citizenship. Immigration and Nationality Act, § 340, 8 U.S.C.A. § 1451.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, CLARK, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

This appeal raises an important question concerning the standard to be applied to the materiality of a misrepresentation by nondisclosure in an action for revocation of citizenship. The government brought this action to revoke the citizenship of Feodor Fedorenko, the defendant-appellee, a naturalized citizen. We agree with the government that the district court erred as a matter of law when it held that the defendant had not procured his citizenship by concealment of a material fact. We hold that it is not necessary that the government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship. Accordingly, we reverse and remand to the district court with instructions to revoke the defendant's certificate of naturalization.

I.

Fedorenko was born in the Ukraine in 1907. In 1941, while serving in the Russian Army, he was captured by German forces. According to his own admissions, the Germans trained him to serve as an armed concentration camp guard and sent him to Treblinka, Poland, a notorious extermination camp.

Following World War II, he worked as a laborer in Germany for four years. In 1949, he applied for admission to the United States under the Displaced Persons Act of 1948, 62 Stat. 1009. Before the district court, the defendant admitted that he had falsified his application for a visa for the United States by misstating his whereabouts during the war years and by failing to note his service as a concentration camp guard. He admitted that he deliberately stated on the visa application that he had been a farmer in Sarny, Poland from 1937 to March 1942, and that the Germans had forced him to work as a laborer from that date until the end of the war. Based on this visa application, an American vice-consul classified the defendant as a displaced person and issued him a visa.

The defendant came to America in November 1949. He has resided in this country since that time and, as the government admits, has led an uneventful and law-abiding life. In 1969 he applied for naturalization. In response to a question on the naturalization application about any foreign military service, he noted his service in the Russian army in 1941. He did not reveal, however, that he had served in the German army as a guard at Treblinka. The Immigration and Naturalization Service (INS) examiner scrutinized the defendant's visa papers, including a report by the Displaced Persons Committee that the defendant had been a farmer and factory worker from 1941–1945. The examiner took these visa papers at face value and recommended that the defendant's application be granted. The defendant was naturalized in 1970.

The government filed this action under 8 U.S.C. § 1451(a) to denaturalize the defendant on the theory that he had procured his citizenship by concealment and misstatement of material facts. The district court refused to strip the defendant of his citizenship. *United States v. Fedorenko*, 1978, S.D.Fla., 455 F.Supp. 893. The court found that the defendant had made false statements in his visa application about his whereabouts during the war years and had failed to disclose his service as a concentration camp guard. The district court held, however, that the defendant's deception did not constitute material misrepresentation and concealment within the meaning of 8 U.S.C. § 1451(a). The court also rejected evidence that the government presented to support its allegation that the defendant had committed war crimes. Finally, the court held that, even if the defendant was guilty of making material misstatements and omissions, equitable considerations required the court to enter judgment for the defendant.

In this appeal, the government raises three challenges to the judgment of the district court. First, it asserts that the defendant's own admissions indicate that his naturalization resulted from material misrepresentation and concealment. Second, it argues that the district court erred in refusing to consider testimony by several survivors of Treblinka, who identified the defendant as a camp guard whom they had observed committing war crimes. Third, it argues that the district court erred in holding that equitable considerations may serve as an alternative ground for its judgment in favor of the defendant.

II.

8 U.S.C. § 1451(a) provides:

> It shall be the duty of the United States attorneys . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting [a naturalized citizen] to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

To assess the government's argument that the defendant's misrepresentation and concealment were "material" under this provision, this Court must first examine the Displaced Persons Act, 62 Stat. 1009, the statute under which the defendant obtained his visa. In that Act, Congress allowed European refugees driven from their homelands by the war to emigrate to the United States without regard for the usual immigration quotas. Section 2(b)–(c) of the Act defined "eligible displaced person" large-

ly by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization of the United Nations, 62 Stat. 3087. That constitution provided that the following persons did not qualify for displaced person status:

> 1. War criminals, quislings and traitors.
>
> 2. Any other persons who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

62 Stat. 3051–52. In addition, § 13 of the Displaced Persons Act itself provided that

> [n]o visas shall be issued under the provisions of this Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States.

62 Stat. 1014.

The government argues that, because the defendant's service as a concentration camp guard indicates that he voluntarily assisted the enemy in persecuting civil populations, he was not qualified for admission into the United States under the Displaced Persons Act. By failing in his visa application to reveal his whereabouts during the war years and his concentration camp guard service, the government continues, the defendant fraudulently obtained his visa. His entry into and residence in the United States was unlawful[1] then, and his naturalization was invalid, since the statute under which he was naturalized required that he must have resided in the United States for at least five years "after being lawfully admitted for permanent residence".[2]

The government's argument hinges on its assertion that the defendant's statements on his visa application about his wartime whereabouts and his deliberate concealment of his service as a concentration camp guard were "material" within the meaning of 8 U.S.C. § 1451(a). The government and the defendant agree that this Court must apply to the facts of this case the standard for materiality adopted by the Supreme Court in *Chaunt v. United States*, 1960, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120. The parties disagree, however, on the meaning of the *Chaunt* standard. To resolve their conflicting assertions, we examine *Chaunt* in detail.

In *Chaunt*, the government sought to denaturalize the defendant because he had procured his citizenship by concealment and misrepresentation of his arrest record. He had stated on a form connected with his naturalization that he had never been arrested. In fact, he had been arrested three times: once for distributing handbills in violation of an ordinance, once for making a speech in violation of park regulations, and once

1. *See* § 10 of the Displaced Persons Act, 62 Stat. 1013 ("[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States"). *See also* § 13(a) of the Immigration Act of 1924, 43 Stat. 153, 161, which was in effect when the defendant entered the United States.

2. Immigration and Nationality Act of 1952, § 316(a), 8 U.S.C. § 1427(a).

for general breach of the peace. All of these arrests occurred at least ten years prior to the defendant's naturalization. Although the record in the case was not clear, it appeared that he was convicted of only one charge, that involving the park regulation. The district court canceled the defendant's naturalization, and the Court of Appeals for the Ninth Circuit affirmed. *Chaunt v. United States*, 1969, 270 F.2d 179.

The Supreme Court reversed. 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120. It first noted that in a denaturalization proceeding the government bears the burden of proof by "clear, unequivocal, and convincing" evidence. 364 U.S. at 353, 81 S.Ct. 147. The Court then held that a misrepresentation or concealment was material only if the government proved

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

364 U.S. at 355, 81 S.Ct. at 151. In applying these alternative materiality standards to the facts of the case, the Court found the government's evidence wanting. As to the first standard, the Court held that the "nature of the arrests, the crimes charged, and the disposition of the cases", in and of themselves, did not even approach clear and convincing evidence that would have warranted denial of citizenship on the ground that the defendant lacked good moral character or did not intend to abide by the laws of the land. 364 U.S. at 354, 81 S.Ct. at 150. As to the second standard, the Court rejected the government's contention that disclosure of the arrests would have caused the Immigration Service to conduct an investigation in which it might have discovered that these arrests had involved activities on behalf of the Communist Party. The Court noted that the defendant had disclosed that he was an employee and member of the International Workers' Order (IWO). Even though the government considered the IWO to be controlled by the Communist Party, the Immigration Service had failed to make any investigation of the defendant's background. Since the Service had failed to investigate whether the relatively incriminating admission of involvement in the IWO indicated that the defendant was a Communist, the Court concluded that, had the defendant revealed that he had been arrested three times for petty offenses, the Service would not have begun an investigation that might have uncovered the defendant's political affiliation and resulted in denial of citizenship. *Id.* at 354–55, 81 S.Ct. 147.

The courts of appeals have disagreed on the interpretation to be accorded *Chaunt*. The defendant argues that this Court should adopt the analysis found in *United States v. Rossi*, 9 Cir. 1962, 299 F.2d 650, and *La Madrid-Peraza v. INS*, 9 Cir. 1974, 492 F.2d 1297. In these cases, the Court of Appeals for the Ninth Circuit held that, under *Chaunt*, a fact suppressed or misstated is not material unless the truth would have justified denial of citizenship. The government responds by asserting that the better analysis is found in *United States v. Oddo*, 2 Cir. 1963, 314 F.2d 115, cert. *denied*, 375 U.S. 833, 84 S.Ct. 50, 11 L.Ed.2d 63. In that case, the Court of Appeals for the Second Circuit held that a fact suppressed or misstated that would not, in and of itself, have warranted denial of citizenship is material nonetheless if its disclosure would have

led the government to conduct an inquiry that might have uncovered other facts justifying denial of citizenship. *Cf. Kassab v. INS*, 6 Cir. 1966, 364 F.2d 806, 807; *Langhammer v. Hamilton*, 1 Cir. 1961, 295 F.2d 642, 648.

The district court adopted the approach of the Court of Appeals for the Ninth Circuit. It held that the government's evidence was not clear and convincing proof that the defendant's whereabouts during the war and his service as a concentration camp guard were, in and of themselves, ultimate facts warranting refusal to issue a visa and denial of citizenship. This finding, of course, was responsive to the first materiality test adopted in *Chaunt*—whether "facts were suppressed which, if known, would have warranted denial of citizenship". The district court then held that this finding also disposed of the government's argument that the defendant's deception was material under the second test in *Chaunt*—whether "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship". The district court held that under this standard the government must first prove the existence of ultimate facts warranting denial of citizenship and then prove that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts. Since the district court had concluded that the government had shown no such ultimate facts, it granted judgment for the defendant.

[1] We hold that the district court's interpretation of the second materiality test of *Chaunt* was an error of law. That interpretation destroyed the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship. We read the second test to require only that the government prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship.

Our interpretation comports with the language of the *Chaunt* opinion. The phraseology of the two tests adopted in *Chaunt* does create some ambiguity about the meaning to be accorded the second test. In an earlier portion of the *Chaunt* opinion, however, the Court cited two unambiguous ways in which nondisclosure would be material:

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

364 U.S. at 352–53, 81 S.Ct. at 149. This passage parallels the Court's later statement adopting the two materiality tests. The passage indicates that the key to the second test is whether disclosure would have led the government to make an inquiry that might have resulted in denial of citizenship. Indeed, the decision in *Chaunt* was grounded in this analysis: since the government had failed to inquire about Chaunt's political affiliation when it knew that he had been active in an organization the government believed was associated with Communist groups, there was no basis for believing that the government would have made any inquiry if he had disclosed his rather insignificant arrest record.[3]

3. In a case predating *Chaunt*, the Court of Appeals for the Sixth Circuit made a clear and concise statement of this approach:

> Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous ar-

Our interpretation of *Chaunt* is further fortified when the ramifications of a contrary holding are considered. The approach adopted by the district court would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility.[4] If his deception is later discovered, the district court's approach would require the government to carry out three difficult tasks: to conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court by clear and convincing evidence. As the government properly contends, if that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS. *See Ganduxe y Marino v. Murff*, 1959, S.D.N.Y., 183 F.Supp. 565, 567, *aff'd*, 2 Cir. 1960, 278 F.2d 330, *cert. denied*, 364 U.S. 824, 81 S.Ct. 61, 5 L.Ed.2d 53.[5]

As Mr. Justice Black has written, "[n]ot only is United States citizenship a 'high privilege', it is a priceless treasure". *Johnson v. Eisentrager*, 1950, 339 U.S. 763, 791, 70 S.Ct. 936, 950, 94 L.Ed. 1255 (dissenting opinion). To guard the

> rests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. . . . Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.
>
> *Corrado v. United States*, 6 Cir. 1955, 227 F.2d 780, 784, *cert. denied*, 351 U.S. 925, 76 S.Ct. 781, 100 L.Ed. 1455. As our discussion in the text indicates, we read the second test of *Chaunt* as adopting this approach.

4. As we have noted, Fedorenko was admitted to the United States under the Displaced Persons Act. Section 10 of the Act provided that "[t]he burden of proof shall be upon the person who seeks to establish his eligibility under this Act". 62 Stat. 1013. The present provision placing the burden of proving eligibility upon the applicant for admission into the United States is found in 8 U.S.C. § 1361. An applicant for naturalization bears the burden of proving eligibility under 8 U.S.C. § 1429. *See also Berenyi v. INS*, 1967, 385 U.S. 630, 636-37, 87 S.Ct. 666, 17 L.Ed.2d 656.

5. The commentators agree with our assessment of *Chaunt*. Appleman has stated that "[t]he inference [to be drawn from *Chaunt*] is that had the facts been of such nature that their disclosure would have been useful in an investigation *possibly* leading to ultimate denial, the Court would regard them as material". Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed.B.J. 267, 272 (1962) (Emphasis in original). Similarly, Gordon and Rosenfield have asserted:

> One view would regard a misstatement as material only if the true facts, if disclosed, would have required denial of the naturalization. [Citing *United States v. Rossi*, 9 Cir. 1962, 299 F.2d 650.] This position has not been generally accepted, and the Supreme Court has declared that a misstatement is material if disclosure would have justified denial of citizenship. [Citing *Chaunt*.] The court stressed the importance of exacting full, frank, honest and unequivocal answers to questions and vigorously discouraged temporizing with the truth.
>
> Decisions in the lower courts generally have held the naturalization applicant to strict accountability for intentional deceptions, emphasizing the government's right to obtain full and truthful responses to its inquiries in the naturalization proceeding, so that it would be enabled to conduct any necessary investigation. [Citing, *inter alia*, *United States v. Oddo*, 2 Cir. 1963, 314 F.2d 115.]
>
> 3 C. Gordon & H. Rosenfield, *Immigration Law and Practice*, § 20.4(b) at 20-14 (1979) (footnotes omitted). *See also* 1A *Id.* at § 4.7c.

integrity of this priceless treasure, the government must be accorded the authority to seek the denaturalization of those who, in procuring citizenship, misstated or concealed facts that, if disclosed, would have led the government to conduct an inquiry that might have resulted in denial of citizenship.[6]

III.

Before the district court, the government presented expert testimony designed to satisfy both of the *Chaunt* tests. The expert witness, Kempton Jenkins, had served as an American vice-consul in Germany administering the Displaced Persons Act. He testified that the vice-consuls were responsible for deciding whether to issue a visa under the Displaced Persons Act and that, for all practical purposes, their decisions were final. According to Jenkins, the vice-consuls believed that any visa applicant who had served as a concentration camp guard was ineligible as a matter of law for a visa because that service constituted either persecution of citizens (war crimes) or voluntary assistance of the enemy. He stated that the vice-consuls considered "involuntary" camp guard service to be a contradiction in terms. To his knowledge, no person who was discovered to have been a guard ever attempted to convince the vice-consuls that his service had been involuntary; instead, Jenkins testified that these persons admitted that they had chosen to undertake that service rather than go into forced labor divisions because the life of a guard was more comfortable.

[2, 3] The district court found unpersuasive Jenkins's testimony that all concentration camp guards were automatically disqualified from obtaining a visa. The court then held that the government had failed to prove by clear and convincing evidence that the defendant's guard service was voluntary and therefore would have resulted in denial of a visa. That finding satisfied the first *Chaunt* test but, under our holding in Part II above, not the second. The evidence before the district court clearly and convincingly proved that, had the defendant disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa.[7] The defendant, then, was

6. As the text indicates, the second materiality test of *Chaunt* is satisfied in a denaturalization proceeding when the government proves by clear and convincing evidence that, if the misrepresented facts had been revealed, it *would* have conducted an investigation that might have resulted in denial of citizenship. This is the standard that the government has urged us to adopt. A less stringent alternative would require the government to prove only that disclosure *might* have led it to conduct an investigation that might have resulted in denial of citizenship. *See Kassab v. INS*, 6 Cir. 1966, 364 F.2d 806, 807. That the government chose to endorse the stronger of these standards may reflect an appreciation that, "in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt' ", *Chaunt*, 364 U.S. at 353, 81 S.Ct. at 149 (quoting *Schneiderman v. United States*, 1943, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796), and "the facts and law should be construed as far as is reasonably possible in favor of the citizen", *Schneiderman*, 320 U.S. at 123, 63 S.Ct. at 1335.

7. Jenkins testified:

> Q. Mr. Jenkins, if either of those documents [the Displaced Persons Commission report or the visa application] had stated that the applicant had served as a guard at any concentration or death camp in occupied Poland during the war what would you have done?
>
> . . . . . .
>
> A. The answer is if there is any indication that the man had served or been in-

guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*. The defendant's assertion before the district court that his guard service was involuntary comes thirty years too late: by failing to disclose that service on his visa application, he prevented the government from conducting a timely investigation of whether he had served under duress or had committed war crimes. In addition, it is irrelevant whether the defendant perpetrated the fraud to avoid reparation to Russia, as he also has asserted, since the immigration law does not allow a defense that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth. *See* 8 U.S.C. § 1451(a).

IV.

Survivors of Treblinka who testified at the trial identified Fedorenko as having been an armed guard at the camp and as having committed acts of violence against the prisoners. We have held, however, that the defendant obtained his citizenship by misrepresentation and concealment of his whereabouts during the war years and his service as a concentration camp guard. Accordingly, we need not address the government's argument that it had proved that he had concealed his perpetration of war crimes at Treblinka. We must, however, consider the district court's alternative holding that, even if the defendant had made material misrepresentations and nondisclosures, equitable considerations required judgment for the defendant.

The district court held that "[t]his denaturalization proceeding is a suit in equity . . . , and equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just". 455 F.Supp. at 918. The court then determined that the equities required judgment for the defendant. *Id.* at 921. It acknowledged that no prior cases had held that a district court had this authority in a denaturalization case, but nonetheless held that the authority exists because "lower courts have exercised discretion in determining whether citizenship should be granted". *Id.* at 919.

[4, 5] In so holding, the district court erred as a matter of law. There is a crucial distinction between a district court's authority to grant citizenship and

> volved in any of the concentration camps that [*sic*] we would have stopped the case right there, suspended it, and called for a further investigation by the CIC [Army Counter-Intelligence Corps] and the other resources we had available and I would of course interrogate the applicant in some depth and with some vigor at that point, and then after I had received whatever information I could dig up I would have reinterrogated at that point.

Tr. 766–67. The district court had refused to accord conclusive weight to Jenkins's testimony that disclosure of the defendant's guard service would have automatically resulted in denial of the visa in large part because the court felt that Jenkins defined "voluntariness" too narrowly and did not have a complete appreciation of the conditions existing at a concentration camp. It appears that the court found no fault with Jenkins's testimony on the processes by which the vice-consuls made their decisions regarding visa applications, and upon reviewing the record we believe that this testimony must be accorded substantial weight. Indeed, the district court found as a matter of fact that "[i]f the Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission under . . . the Displaced Persons Act". 455 F.Supp. at 915.

its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and civics. *See* 8 U.S.C. §§ 1423, 1427. The district courts must be accorded some discretion to make these determinations. *See, e. g., Petition of R.*, 1944, D.Mass., 56 F.Supp. 969. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship. *United States v. Ginsberg*, 1917, 243 U.S. 472, 474, 37 S.Ct. 422, 61 L.Ed. 853. The denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship. Indeed, in amending that provision in 1961, Congress stated:

> Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time the citizenship is granted.

H.R.Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961), *reprinted in* [1961] 2 U.S.Code Cong. & Admin.News, pp. 2950, 2983. Thus, what the Supreme Court said in *Johannessen v. United States*, 1912, 225 U.S. 227, 241–42, 32 S.Ct. 613, 56 L.Ed. 1066, and repeated in *Knauer v. United States*, 1946, 328 U.S. 654, 673, 66 S.Ct. 1304, 1314, 90 L.Ed. 1500, remains true today:

> An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.

REVERSED AND REMANDED. On remand, the district court is directed to enter judgment for the United States and to cancel the certificate of naturalization issued to the defendant.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Exhibit C Certification of Character

PWDP FORM SC 5

CERTIFICATE OF CHARACTER

(1) IRO	(2) DPACCS	(3) European Case No.
903	CMLO	082847

Mr/Mrs/Miss FEDORE NEE Feodor
(Christian and Family name, Maiden name also for married women)

Registered by IRO 903 DPACCS

Born on September 17th, 1907 at Sarny/Poland

Certified for the information of US DP Commission.

Available DPACCS records show no convictions under Mil Gov or German Law*
~~convictions are noted~~

A/n has been of good conduct whilst a member of this Group.

Signed Major
O.C.403 BSE (RPC) CMLO (Lab.Group)
OC ~~XXXXXXX~~
(Major J.B.A. Bickford)

Date

*Delete not applicable

~~PSS(IC)/R3885*/8/84/4-45~~

Exhibit D Declaration in Lieu of Oath

EC No - 8284

Certified Translation

Dres.Wintig, Kauffmann
Sieveking, Baur, Harm
Notaries Public
(24a) HAMBURG 1,Bergstr. 11
(Haus Commeter)
Tel.: 32 68 56/57

Dr. B/Pa.

Declaration in Lieu of an Oath

I, the undersigned Feodor F e d o r e n k o , Motor-Driver, residing at Hamburg-Osdorf, DP Camp, make the following declaration in lieu of an oath after the attesting Notary Public explained to me the significance of such a declaration:

I was born in Sarny/Poland, on 78-2879 September, 1905.

My father, Dimitri F e d o r e n k o , was, as far as I know, born in Sarny in the year 1881. My mother, Anna F e d o r e n k o née Huber was, as far as I know, born in Sarny in the year 1883.

As far as I remember my parents were married in Sarny in the year 1905. Both my parents are dead.

I am a Polish-Ukrainian National.

I am no longer in possession of documents referring to my descent and to my birth. They were destroyed by fire in the Camp Pehlitz near Stettin. I am unable to have the documents replaced.

Hamburg, 28th.June, 1949.

(sgd) Feodor F e d o r e n k o

Notarial Register No.1329/1949.

I, Dr.juris Heinrich B a u r, a Notary Public practising in H a m b u r g, certify hereby that the above signature, subscribed in my presence, is the genuine signature of Mr. --- Feodor (Feodor) F e d o r e n k o, Motor-Driver, residing --- at Hamburg-Osdorf, DP-Camp, Identified by Identity Card --- No.311741, issued on 2nd.May,1949.--

Hamburg, this Twenty-Eighth day of June,One Thousand Nine Hundred and Forty-Nine - 28th.June,1949 - .

Value: DM 1,000.--
Fee:Paras 26,43,145 Reich Tar. DM 8.--
Turnover Tax -.24
DM 8.24

(sgd) B a u r

(sgd) B. (L.S.Not.)

I,Mrs.Paula Mörer, Sworn Translator and Interpreter of the English language in and for the Hansestadt Hamburg,certify /

p.t.o.

hereby that the foregoing is a true and faithful translation of the respective document in the German language submitted to me to-day.

Witness my hand and seal at Hamburg this Twenty-Eighth day of June, 1949.

Hans Paula Stein

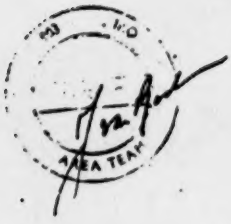
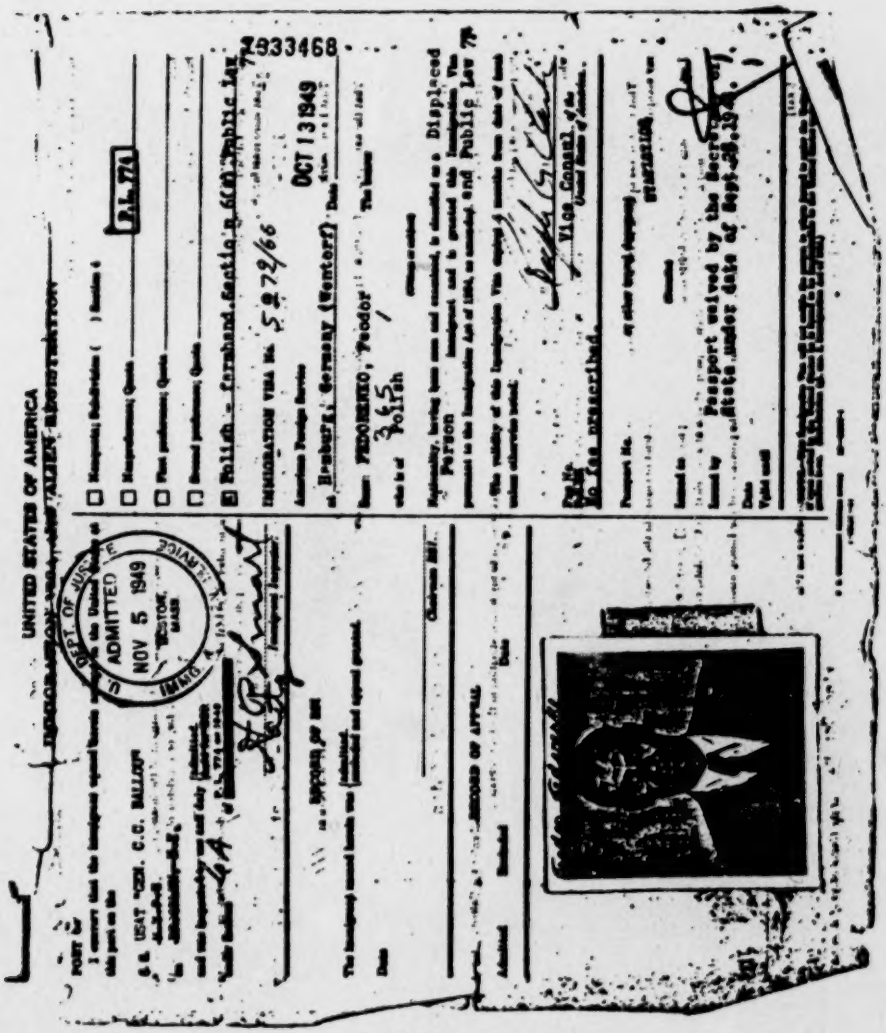
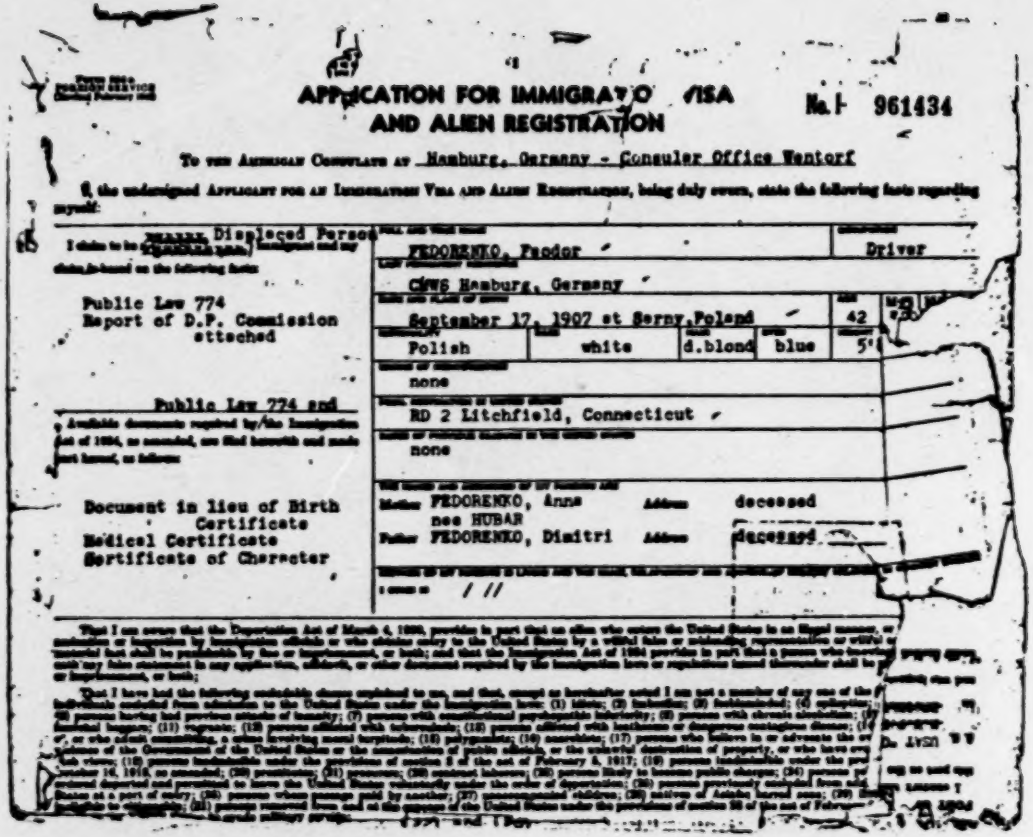


Exhibit E Application for Immigration Visa





APPLICATION FOR IMMIGRANT VISA AND ALIEN REGISTRATION

No. 961434

To the American Consulate at Hamburg, Germany - Consular Office Wentorf

I, the undersigned Applicant for an Immigration Visa and Alien Registration, being duly sworn, state the following facts regarding myself:

I claim to be a Displaced Person and my claim is based on the following facts:

Public Law 774
Report of D.P. Commission
attached

Public Law 774 and

The available documents required by the Immigration Act of 1924, as amended, are filed herewith and made part hereof, as follows:

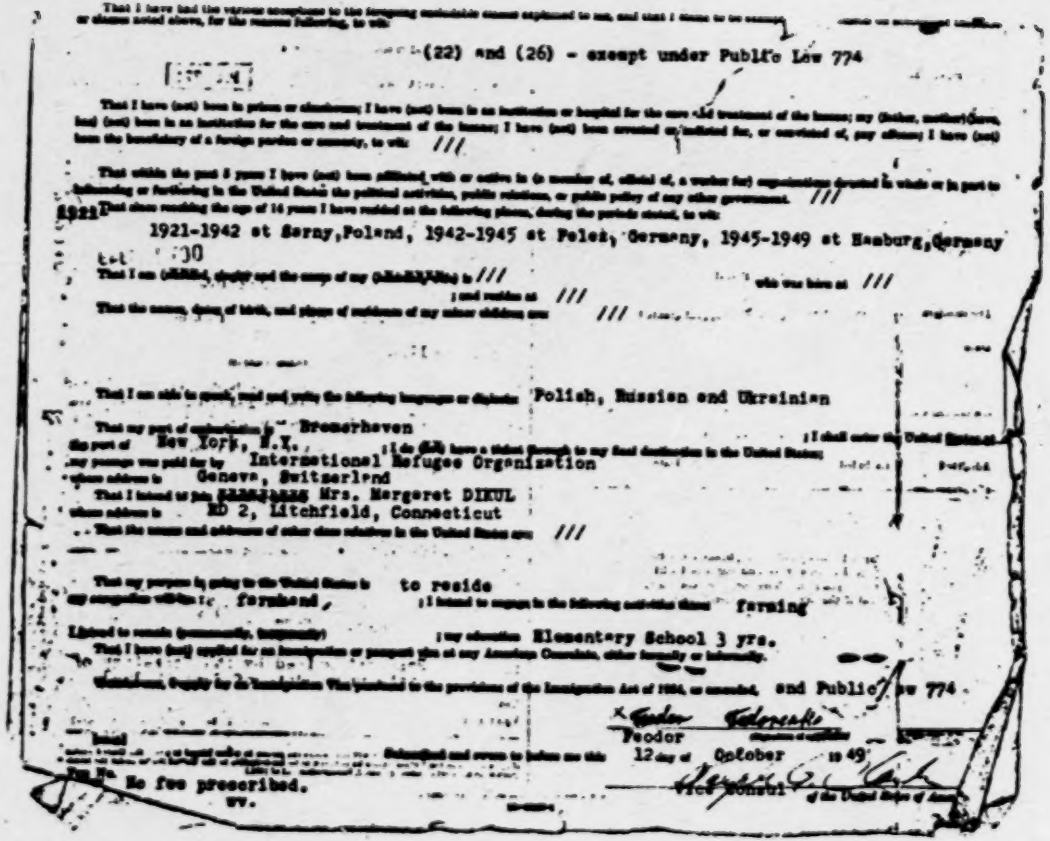
Document in lieu of Birth Certificate
Medical Certificate
Certificate of Character

FEDORENKO, Fredor					Driver
CIRS Hamburg, Germany					
September 17, 1907 at Sorny, Poland				42	W
Polish	white	d.blond	blue	5'	
none					
RD 2 Litchfield, Connecticut					
none					
Mother FEDORENKO, Anna nee HUBAR		Address	deceased		
Father FEDORENKO, Dimitri		Address	deceased		
I swear so help me God. //					

That I am aware that the Deportation Act of March 4, 1929, provides in part that an alien who enters the United States in an illegal manner, or procures or attempts by fraud to procure admission at or who attempts entry to the United States by a willful false or misleading representation or willful concealment of a material fact shall be punishable by fine or imprisonment, or both; and that the Immigration Act of 1924 provides in part that a person who knowingly and with any false statement in any application, affidavit, or other document required by the immigration laws or regulations issued thereunder shall be punishable by fine or imprisonment, or both;

That I have had the following excludable classes explained to me, and that, except as hereinafter noted I am not a member of any one of the following classes excluded from admission to the United States under the immigration laws: (1) idiots; (2) insane; (3) epileptics; (4) [illegible]; (5) persons having had previous attacks of insanity; (6) persons with constitutional psychopathic inferiority; (7) persons with chronic alcoholism; (8) paupers; (9) professional beggars; (10) vagrants; (11) persons afflicted with tuberculosis; (12) persons afflicted with loathsome or dangerous contagious disease; (13) persons not comprehended within any of the foregoing classes who are found to be mentally, physically, or both, defective, such defect affecting the ability of such alien to earn a living; (14) persons convicted of a crime involving moral turpitude; (15) polygamists; (16) anarchists; (17) persons who believe in or advocate the overthrow by force or violence of the Government of the United States or the assassination of public officials, or the unlawful destruction of property, or who have any such views; (18) persons [illegible] under the provisions of section 3 of the act of February 5, 1917; (19) persons [illegible] under the provisions of the act of October 16, 1918, as amended; (20) prostitutes; (21) procurers; (22) contract laborers; (23) persons likely to become public charges; (24) persons previously deported and [illegible] to leave the United States voluntarily under the order of deportation; (25) persons previously excluded from admission to the United States as a part of [illegible]; (26) persons whose passage paid by another; (27) [illegible] children; (28) natives of Asiatic barred zones; (29) [illegible] to citizenship; (30) persons [illegible] from and at the purpose of the United States under the provisions of section 38 of the act of February [illegible]

[illegible] and I Pay



That I have had the various exceptions to the foregoing excludable classes explained to me, and that I am not within any of the classes noted above, for the reasons following, to wit:

(22) and (26) - exempt under Public Law 774

That I have (not) been in prison or almshouses; I have (not) been in an institution or hospital for the care and treatment of the insane; my (father, mother) (have, had) (not) been in an institution for the care and treatment of the insane; I have (not) been arrested or indicted for, or convicted of, any offense; I have (not) been the beneficiary of a foreign pardon or amnesty, to wit: ///

That within the past 5 years I have (not) been affiliated with or active in the membership of, official of, a worker for) organizations devoted in whole or in part to influencing or furthering in the United States the political activities, public relations, or public policy of any other government. ///

That since reaching the age of 16 years I have resided at the following places, during the periods stated, to wit:

1921-1942 at Sarny,Poland, 1942-1945 at Pelez, Germany, 1945-1949 at Hamburg,Germany

That I am (divorced, single) and the name of my (husband/wife) is /// who was born at ///

and resides at /// ///

That the names, dates of birth, and places of residence of my minor children are

That I am able to speak, read and write the following languages or dialects: Polish, Russian and Ukrainian

That my port of application is Bremerhaven

the port of New York, N.Y. ; I do (do not) have a visa through to my final destination in the United States; I shall enter the United States at

my passage was paid for by International Refugee Organization

whose address is Geneva, Switzerland

That I intend to join Mrs. Margaret DIKUL

whose address is RD 2, Litchfield, Connecticut

That the names and addresses of other close relatives in the United States are: ///

That my purpose in going to the United States is to reside

my occupation will be farmhand ; I intend to engage in the following activities there: farming

I intend to remain (permanently, temporarily) ; my education Elementary School 3 yrs.

That I have (not) applied for an immigration or passport visa at any American Consulate, either formally or informally.

Wherefore, I apply for an immigration Visa pursuant to the provisions of the Immigration Act of 1924, as amended, and Public Law 774.

Theodor Fedorenski

Subscribed and sworn to before me this 12 day of October 19 49

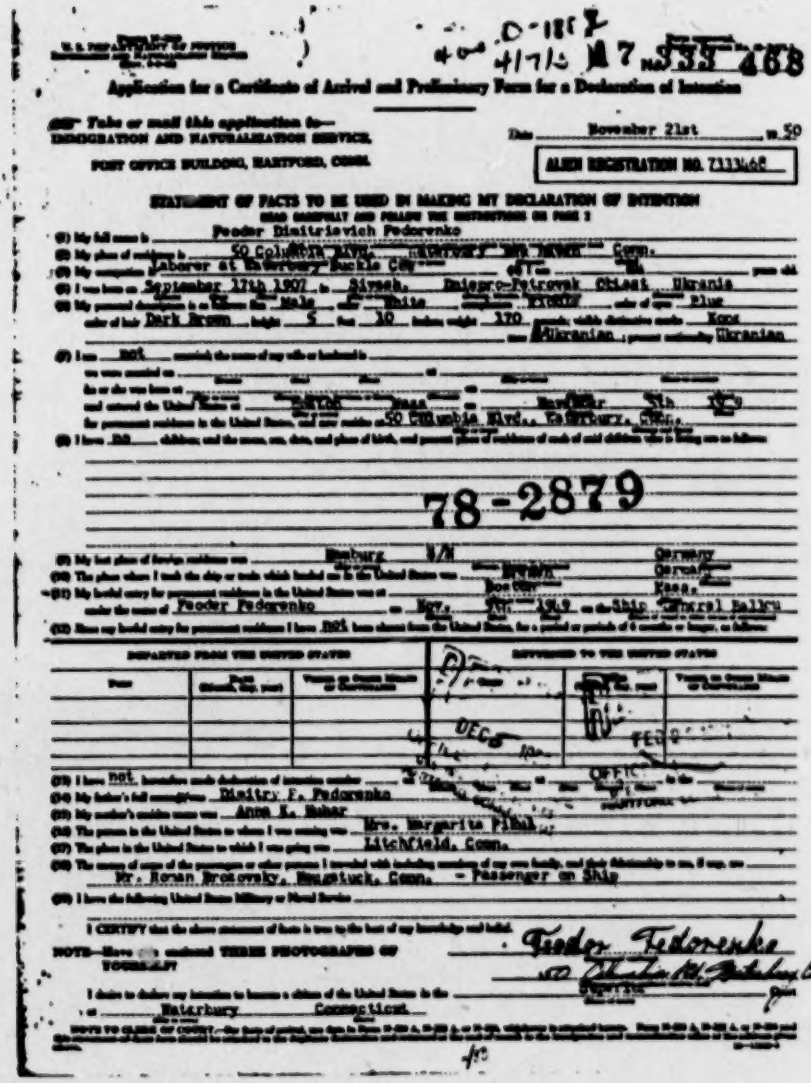
Vice Consul of the United States of America

No fee prescribed.

VV.

73a

Exhibit F Application for Certificate of Arrival



D-187
4171
M 7 333 468

Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention

Take or mail this application to—
IMMIGRATION AND NATURALIZATION SERVICE,
POST OFFICE BUILDING, HARTFORD, CONN.

Date November 21st, 1950

ALIEN REGISTRATION NO. 7113468

STATEMENT OF FACTS TO BE USED IN MAKING MY DECLARATION OF INTENTION
READ CAREFULLY AND FOLLOW THE INSTRUCTIONS ON PAGE 3

(1) My full name is Feodor Dimitrievich Fedorenko
(2) My place of residence is 50 Columbia Blvd. Waterbury 3, New Haven Conn.
(3) My occupation is Laborer at Waterbury Buckle Co. I am 44 years old
(4) I was born on September 17th 1907 in Sivash, Dniepro-Petrovsk Oblast Ukrania
(5) My personal description is: Sex Male, color White, complexion Ruddy, color of eyes Blue
color of hair Dark Brown, height 5 feet 10 inches, weight 170 pounds; visible distinctive marks Nose
(6) I am not married. The name of my wife or husband is Ukranian; present nationality Ukranian
We were married on [illegible] at [illegible]
She or she was born at [illegible]
and entered the United States at [illegible] on [illegible]
for permanent residence in the United States, and now resides at 50 Columbia Blvd., Waterbury, Conn.
(7) I have no children, and the name, sex, date, and place of birth, and present place of residence of each of said children who is living, are as follows:

78-2879

(8) My last place of foreign residence was Hamburg W/M Germany
(9) The place where I took the ship or took which landed me in the United States was Bremen Germany
(10) My lawful entry for permanent residence in the United States was at Boston Mass.
under the name of Feodor Fedorenko on Nov. 7th 1949 on the ship General Rally
(11) Since my lawful entry for permanent residence I have not been absent from the United States for a period of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
From	Date (Month, day, year)	Vessel or Means of Conveyance	To	Date (Month, day, year)	Vessel or Means of Conveyance

(12) I have not heretofore made declaration of intention number [illegible] at [illegible]
(13) My father's full name is Dmitry F. Fedorenko
(14) My mother's maiden name was Anna K. Buber
(15) The person in the United States to whom I was coming was Mrs. Margarite Pihl
(16) The place in the United States to which I was going was Litchfield, Conn.
(17) The names of some of the passengers or other persons I traveled with including members of my own family, and their relationship to me, if any, are
Fr. Roman Prokovsky, Naugatuck, Conn. - Passenger on Ship
(18) I have the following United States Military or Naval Service

I CERTIFY that the above statement of facts is true to the best of my knowledge and belief.

Feodor Fedorenko

NOTE—Have [illegible] enclosed THREE PHOTOGRAPHS OF YOURSELF

I desire to declare my intention to become a citizen of the United States to the [illegible] Court
at Waterbury Connecticut

INSTRUCTIONS TO THE APPLICANT

This form must be completely filled out (preferably on the typewriter)

When Declaration Not Required.—You are not required to file a declaration of intention to become a citizen of the United States if you are—

(a) An alien who has served honorably for 3 years in the United States Army, Navy, Marine Corps, or Coast Guard, or for 5 years on board any vessel of the United States Government other than the Navy, Marine Corps, or Coast Guard, or on board vessels of more than 20 tons burden which are not foreign vessels and whose home port is in the United States, provided your petition is filed while you are still in such service or employment, or within 6 months after having such service or employment.

(b) An alien who married a citizen of the United States or whose spouse was naturalized on or subsequent to September 22, 1922; or

(c) A woman who, prior to September 22, 1922, lost your American citizenship by: (1) marriage to an alien or through the loss of American citizenship by your husband, or (2) by marriage to an alien ineligible to citizenship after September 22, 1922.

(d) An alien who has served honorably in an active duty status in the military or naval forces of the United States during either World War I (April 6, 1917, to November 11, 1918), or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions.

Immigrant Identification Cards and Alien Registration Receipt Cards.—Every alien who entered the United States for permanent residence on the basis of an immigration visa on or after July 1, 1929, and prior to August 27, 1940, should be in possession of an Immigrant Identification Card. Every alien in the United States should be in possession of an Alien Registration Receipt Card. You need not forward either card with this application. However, you will be required to present these cards when you appear to file your petition for naturalization and to surrender them at the time you are admitted to citizenship. You should therefore carefully save your Immigrant Identification Card and your Alien Registration Receipt Card.

Photographs.—You are required to send with this application three identical photographs of yourself taken within 30 days of the date of this application. These photographs must be 2 by 2 inches in size, and the distance from top of head to point of chin should be approximately 1¼ inches. They must not be pasted on the cards or mounted in any other way, must be on thin paper, have a light background, and clearly show a front view of your face without hat. Snapshots, group or full-length portraits will not be accepted. All of these photographs must be signed by you on the margin and not on the face or the clothing.

Date of Your Arrival.—If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot obtain this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them in the appropriate blank spaces on the first page of this form. Your Immigrant Identification Card or your passport, ship's card, or baggage labels, if you have them, may help you to answer these questions.

If the date of your arrival in the United States was on or before June 29, 1906, you should submit with this application documentary evidence of your residence in the United States prior to that date. Such documents may be family bible entries, deeds of record, wills or other authentic legal documents, life insurance policies, bank books and records, employment records or other documents showing that you entered the United States on or before June 29, 1906. Do not submit such documents if your arrival in the United States was after June 29, 1906.

Absence From the United States.—In statement No. 12 on first page show only your absences which were for 6 or more months. Absence from the United States for more than 6 months but less than 1 year during the periods of continuous residence required in the United States may break the continuity of your residence for naturalization purposes. An absence from the United States of 1 year or more during such periods will break the continuity of your residence for naturalization purposes, except that after you have resided in the United States for at least 1 year and have filed a declaration of intention, if your absence abroad is made necessary because you are an employee of the United States Government, an American institution of research, or an American firm or corporation engaged in foreign trade and commerce of the United States, you may prevent a break in the continuity of your residence for naturalization purposes by making an application on Form M–578. For complete information you should address the office of this Service nearest to you, or the "Commissioner of Immigration and Naturalization, Washington, D. C."

Nationality and Race.—Nationality in statement No. 6 on first page refers to the country of which you are a citizen or subject. As to "race" in the same statement, Section 303 of the Nationality Act of 1940 provides that only white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere are eligible for naturalization. There are certain exceptions, in the case of native-born Filipinos who have served honorably in the United States Army, Navy, Marine Corps, or Coast Guard for a period of at least 3 years, and in the cases of women who have lost citizenship through marriage.

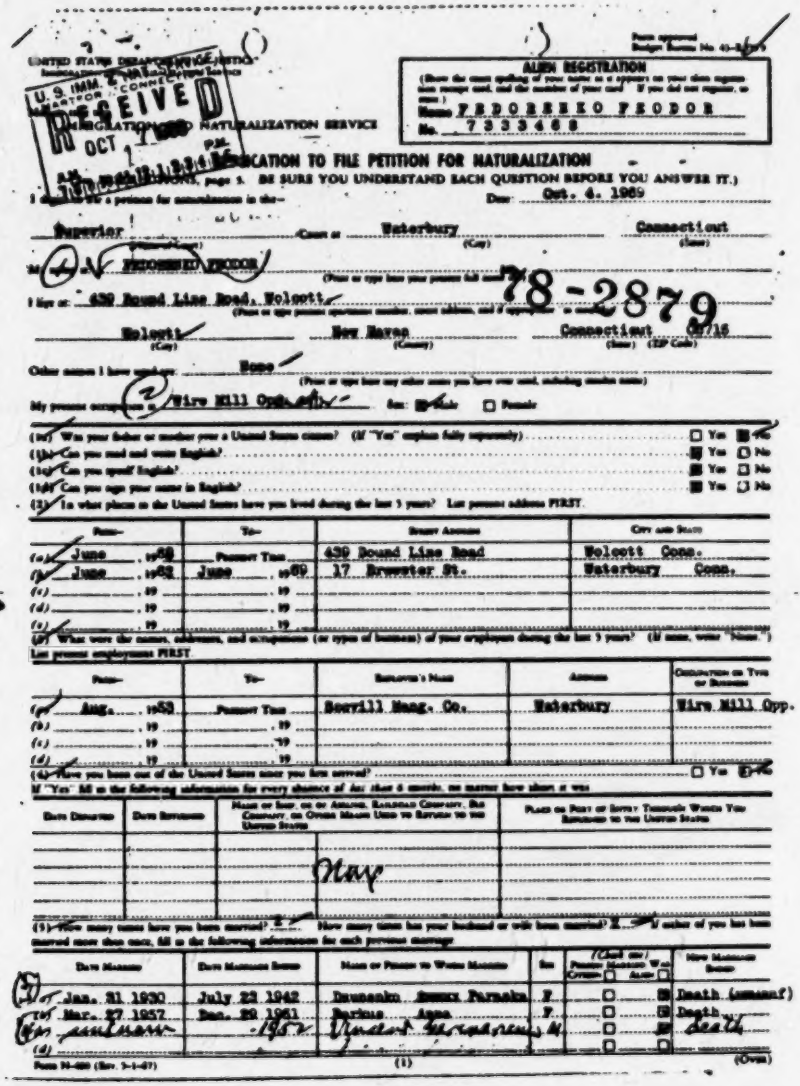
Military or Naval Service.—If you have served in the armed forces of the United States at any time, give the date of enlistment or induction, the branch of the service in which you served, the date of discharge and the nature of the discharge received.

PENALTY FOR FALSELY SWEARING IN NATURALIZATION CASES

It is a felony, punishable by a fine of not more than $2,000 or imprisonment for not more than 5 years, or both, for an alien or other person, whether an applicant for naturalization or citizenship, or otherwise, knowingly to make a false statement under oath either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship. (18 U. S. Code 1015 (a).)

RECEIVED
DEC 25 1950

Exhibit G Application to file petition for Naturalization



U.S. IMM. & NATURALIZATION SERVICE
RECEIVED
OCT 1 1979
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION
Name FEDORENKO FEDOR
No. 7333468

APPLICATION TO FILE PETITION FOR NATURALIZATION

Date: Oct. 4, 1979

Superior — Waterbury — Connecticut

I live at: 439 Round Line Road, Wolcott — 78-2879

Wolcott — New Haven — Connecticut

Other names I have used: None

My present occupation is: Wire Mill Opr.

(1a) Was your father or mother ever a United States citizen? (If "Yes" explain fully separately) ☐ Yes ☒ No
(1b) Can you read and write English? ☒ Yes ☐ No
(1c) Can you speak English? ☒ Yes ☐ No
(1d) Can you sign your name in English? ☒ Yes ☐ No

(2) In what places in the United States have you lived during the last 5 years? List present address FIRST.

From	To	Street Address	City and State
June 1953	Present Time	439 Round Line Road	Wolcott Conn.
June 1953	June 1979	17 Brewster St.	Waterbury Conn.
19	19		
19	19		
19	19		

(3) What were the names, addresses, and occupations (or types of business) of your employers during the last 5 years? (If none, write "None") List present employment FIRST

From	To	Employer's Name	Address	Occupation or Type of Business
Aug. 1953	Present Time	Scovill Mfg. Co.	Waterbury	Wire Mill Opr.
19	19			
19	19			
19	19			

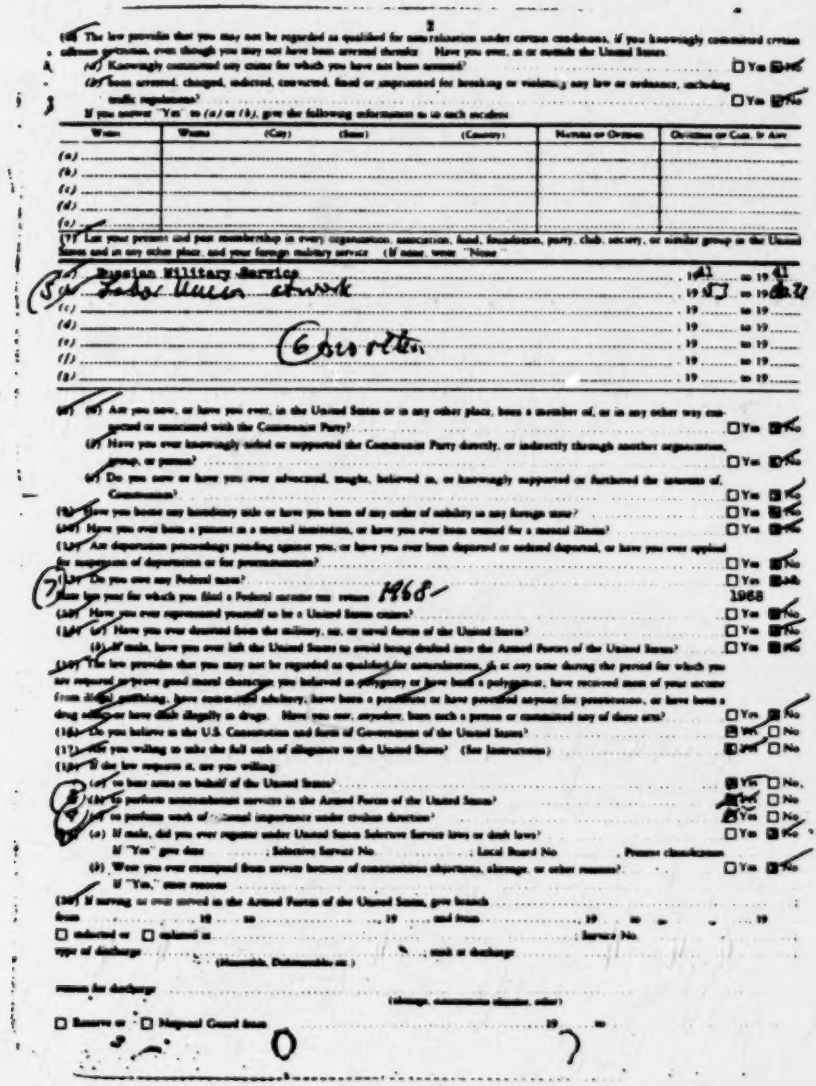
(4) Have you been out of the United States since you first arrived? ☐ Yes ☒ No
If "Yes" fill in the following information for every absence of less than 6 months, no matter how short a visit

Date Departed	Date Returned	Name of Ship, Car, or Airline, Railroad Company, Bus Company, or Other Means Used to Return to the United States	Place or Port of Entry Through Which You Returned to the United States
		Navy	

(5) How many times have you been married? 2 How many times has your husband or wife been married? 2 If either of you has been married more than once, fill in the following information for each previous marriage

Date Married	Date Marriage Ended	Name of Person to Whom Married	Sex	Married Person Divorced / Widowed / Annulled	How Marriage Ended
(a) Jan. 31 1930	July 23 1942	Dmusenko Sonya Fursaka	F	☐ ☐ ☒	Death (unsure)
(b) Mar. 27 1957	Dec. 29 1961	Perkins Anna	F	☐ ☐ ☒	Death
(c) unknown	1957	Divorced Wife of Andrew	M	☐ ☐ ☒	Death
(d)				☐ ☐ ☐	

Form N-400 (Rev. 3-1-67) (1) (Over)



3

(28) The law provides that you may not be regarded as qualified for naturalization under certain conditions, if you knowingly committed certain offenses or crimes, even though you may not have been arrested therefor. Have you ever, in or outside the United States

(a) Knowingly committed any crime for which you have not been arrested? ☐ Yes ☒ No

(b) Been arrested, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations? ☐ Yes ☒ No

If you answer "Yes" to (a) or (b), give the following information as to each incident:

When	Where	(City)	(State)	(Country)	Nature of Offense	Outcome or Case, if Any
(a)						
(b)						
(c)						
(d)						
(e)						

(29) List your present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service. (If none, write "None.")

(a) Russian Military Service ..... 19 41 to 19 41

(b) Labor Union Arbeit ..... 19 41 to 19 44

(c) ..... 19 ..... to 19 .....

(d) ..... 19 ..... to 19 .....

(e) ..... 19 ..... to 19 .....

(f) ..... 19 ..... to 19 .....

(g) ..... 19 ..... to 19 .....

(30) (a) Are you now, or have you ever, in the United States or in any other place, been a member of, or in any other way connected or associated with the Communist Party? ☐ Yes ☒ No

(b) Have you ever knowingly aided or supported the Communist Party directly, or indirectly through another organization, group, or person? ☐ Yes ☒ No

(c) Do you now or have you ever advocated, taught, believed in, or knowingly supported or furthered the interests of, Communism? ☐ Yes ☒ No

(31) (a) Have you become any hereditary title or have you been of any order of nobility in any foreign state? ☐ Yes ☒ No

(b) Have you ever been a patient in a mental institution, or have you ever been treated for a mental illness? ☐ Yes ☒ No

(32) (a) Are deportation proceedings pending against you, or have you ever been deported or ordered deported, or have you ever applied for suspension of deportation or for permanent resident status? ☐ Yes ☒ No

(b) Do you owe any Federal taxes? ☐ Yes ☒ No

(c) State the year for which you filed a Federal income tax return 1968 - 1968

(33) (a) Have you ever represented yourself to be a United States citizen? ☐ Yes ☒ No

(b) (1) Have you ever deserted from the military, air, or naval forces of the United States? ☐ Yes ☒ No

(2) If male, have you ever left the United States to avoid being drafted into the Armed Forces of the United States? ☐ Yes ☒ No

(34) The law provides that you may not be regarded as qualified for naturalization, if at any time during the period for which you are required to prove good moral character you believed in polygamy or have been a polygamist, have received some of your income from illegal gambling, have committed adultery, have been a prostitute or have procured anyone for prostitution, or have been a drug addict or have dealt illegally in drugs. Have you ever, anywhere, been such a person or committed any of these acts? ☐ Yes ☒ No

(35) Do you believe in the U.S. Constitution and form of Government of the United States? ☒ Yes ☐ No

(36) Are you willing to take the full oath of allegiance to the United States? (See Instructions) ☒ Yes ☐ No

(37) If the law requires it, are you willing

(a) to bear arms on behalf of the United States? ☒ Yes ☐ No

(b) to perform noncombatant services in the Armed Forces of the United States? ☒ Yes ☐ No

(c) to perform work of national importance under civilian direction? ☒ Yes ☐ No

(38) (a) If male, did you ever register under United States Selective Service laws or draft laws? ☐ Yes ☒ No

If "Yes" give date ....., Selective Service No. ....., Local Board No. ....., Present classification .....

(b) Were you ever exempted from service because of conscientious objections, alienage, or other reasons? ☐ Yes ☒ No

If "Yes," state reasons .....

(39) If serving or ever served in the Armed Forces of the United States, give branch .....

from ..... 19 .... to ..... 19 .... and from ..... 19 .... to ..... 19 ....

☐ inducted or ☐ enlisted in ..... Service No. .....

type of discharge ..... (Honorable, Dishonorable, etc.) rank at discharge .....

reason for discharge ..... (discharge, commutation, release, other)

☐ Reserve or ☐ National Guard from ..... 19 .... to .....

ALIEN REGISTRATION
Name FEDORENKO, Fedor
No. 7333468

STATEMENT OF FACTS FOR PREPARATION OF PETITION

SECTION OF LAW 316a

(10) My full, true, and correct name is Fedor Fedorenko Feodor (Full, true name to be written)

(11) My present place of residence is 420 Round Line Road Wolcott Conn. (Number and street) (City or town) (State)

(12) I was born on Sep. 27 1907 in Bohonicky Galicia Ukr. S. Sov. R. (Month) (Day) (Year) (City or town) (County, district, province or state) (Country)

(13) I am White and have 2 living children. (Color) (Complete only if married, widowed or widower)

(14) My wife was born on Mar. 27, 1907 in Wolczkowy Ukr. S. Sov. R. (Month) (Day) (Year) (City or town) (State or country)

(15) My present wife was born in Bohonicky Galicia Ukr. S. Sov. R. (City or town) (County) (State or country)

(16) I was married to Anna nee Barko on Sep. 24 1931 at Bohonicky Galicia Ukr. S. Sov. R. (Month) (Day) (Year) (City or town) (County) (State or country)

(17) I have ~~no~~ previous marriage.

(18) My present wife entered the United States at Derby Conn. on or about 1949 (City or town) (State) (Year)

(19) I was admitted to the United States for permanent residence on Dec. 29, 1961 (Month) (Day) (Year)

(20) My present wife was naturalized on ~~Nov.~~ ~~5~~ ~~1949~~ at ~~Boston~~ ~~Mass.~~ (Month) (Day) (Year) (City or town) (State)

Certificate No. ~~FEDOR Fedorenko Feodor C.C. WAC General Ballou.~~ or became a citizen by ~~(Name of vessel or other means of conveyance)~~

(21) I was lawfully admitted to the United States for permanent residence on Nov. 5 1949 (Month) (Day) (Year)

(22) The name of FEDOR Fedorenko Feodor C.C. WAC General Ballou. at Boston Mass. (City) (State)

(23) I have resided continuously in the United States of America since Nov. 5 1949 and continuously in the State of Connecticut where I now live since 1949 and during the past five years I have been physically present in the United States for an aggregate period of 60 months.

(24) I (have not) previously filed petition for naturalization No. on (Month) (Day) (Year) at (City) (State) in the Court.

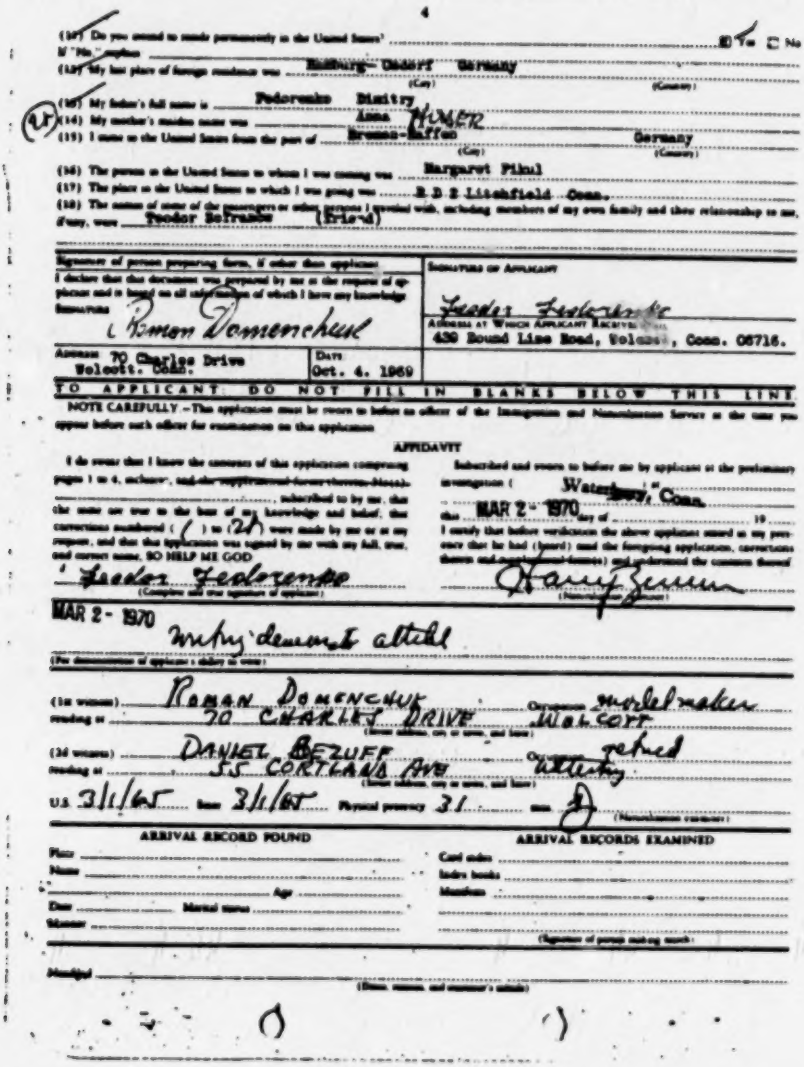
(25) I wish the naturalization court to change my name to Bone (Give full name desired in new "Name")

(26) Since such lawful admission, I have not been absent from the United States for a period or periods of 6 months or longer except as follows (if none, state "None") Bone

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Port	Date (Month, day, year)	Vessel or Other Means of Conveyance	Port	Date (Month, day, year)	Vessel or Other Means of Conveyance

(27) My children now living are: (Complete all columns as to each child. If child lives with you, write "with me" in last column; otherwise, give city and state of child's residence.)

Name	Sex	Place Born	Date Born	Now Lives At—
Iva D	W	Ukr. S. S. R.	1930	Ukr. S. S. R.
Viktor	M	"	1934	"



4

(13) Do you intend to reside permanently in the United States? ☒ Yes ☐ No

If "No," explain

(12) My last place of foreign residence was Hamburg-Eidorf (City) Germany (Country)

(10) My father's full name is Fedorenko Dimitry

(14) My mother's maiden name was Anna Hunger

(15) I came to the United States from the port of Bremen-Hafen (City) Germany (Country)

(16) The person in the United States to whom I was coming was Margaret Pilul

(17) The place in the United States to which I was going was R D 2 Litchfield Conn.

(18) The names of some of the passengers or other persons I traveled with, including members of my own family and their relationship to me, if any, were Feodor Zefranko (Friend)

Signature of person preparing form, if other than applicant

I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge.

Signature: Roman Domenchuk

Address: 70 Charles Drive Wolcott, Conn.

Date: Oct. 4, 1969

SIGNATURE OF APPLICANT: Feodor Fedorenko

ADDRESS AT WHICH APPLICANT RECEIVES MAIL: 430 Round Line Road, Wolcott, Conn. 06716.

TO APPLICANT: DO NOT FILL IN BLANKS BELOW THIS LINE

NOTE CAREFULLY.—This application must be sworn to before an officer of the Immigration and Naturalization Service at the time you appear before such officer for examination on this application.

AFFIDAVIT

I do swear that I know the contents of this application (comprising pages 1 to 4, inclusive, and also supplemental sheet(s) numbered _____), subscribed to by me, that the same are true to the best of my knowledge and belief, that corrections numbered ( ) to (21) were made by me or at my request, and that this application was signed by me with my full, true, and correct name, SO HELP ME GOD

Feodor Fedorenko
(Complete and true signature of applicant)

Subscribed and sworn to before me by applicant at the preliminary investigation at Waterbury, Conn.

this MAR 2 - 1970 day of _____, 19____

I certify that before verification the above applicant named as my witness that he had (heard) read the foregoing application, corrections thereon and supplemental sheet(s) and understood the contents thereof.

Harry Zemon
(Immigration officer)

MAR 2 - 1970

Mtg. denom. & attchd
(For determination of applicant's ability to write)

(1st witness) ROMAN DOMENCHUK residing at 70 CHARLES DRIVE Occupation Model maker WOLCOTT

(2d witness) DANIEL BEZUFF residing at 55 CORTLAND AVE Occupation retired attorney

U.S. 3/1/65 from 3/1/65 Physical presence 31 min 2

ARRIVAL RECORD FOUND

Place _____

Name _____

_____ Age _____

Date _____ Marital status _____

Manner _____

Manifest _____
(Name, vessel, and examiner's initials)

ARRIVAL RECORDS EXAMINED

Card index _____

Index books _____

Manifests _____

_____
(Signature of person making search)

Exhibit H Certificate of Naturalization

FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5602

FEODOR FEDORENKO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1979.
CERTIORARI GRANTED FEBRUARY 19, 1980.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 15, 1977 Summons and Complaint of United States v. Feodor Fedorenko

October 17, 1977 Defendant's Motion for Change of Venue

November 2, 1977 Denial of Motion for Change of Venue

November 8, 1977 Motion for Reconsideration of a Change of Venue

November 21, 1977 Motion for Reconsideration Granted

December 21, 1977 Denial of Motion for Change of Venue After Reconsideration

February 4, 1978 Answer and Special Defense of Defendant

February 14, 1978 Motion for Change of Venue

February 17, 1978 Denial of Motion for Change of Venue

April 21, 1978 Amended Complaint of the United States

May 3, 1978 Commencement of Trial in Connecticut—Defense Portion

May 30, 1978 Resumption of Trial in Fort Lauderdale

July 25, 1978 Memorandum of Decision of District Court

August 24, 1978 Appeal by United States to United States Court of Appeal

June 28, 1979 Decision of United States Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action File No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA, PLAINTIFF

v.

FEODOR FEDORENKO, a/k/a FEODER DIMITRIEVICH FEDORENDO, a/k/a FEODER FEDORENKO, a/k/a VLADIMIR SERDIUK, DEFENDANT

SUMMONS—Filed Aug. 15, 1977

To the above named Defendant: FEODOR FEDORENKO, a/k/a etc., 352 Euclid Avenue,

Apt. 8, Miami Beach, Florida

You are hereby summoned and required to serve upon

VINCENT K. ANTLE
UNITED STATES ATTORNEY

By: Nathaniel H. Speights
Assistant U.S. Attorney

plaintiff's attorneys, whose address

300 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail

to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ Joseph I. Bogart
Clerk of Court

/s/ M. P. Wilkerson
Deputy Clerk
[SEAL OF COURT]

Date: Aug. 15, 1977

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

77-2668-Civ-NCR

UNITED STATES OF AMERICA, PLAINTIFF

v.

FEODOR FEDORENKO, aka FEODER DIMITRIEVICH FEDORENDO, aka FEODER FEDORENKO, aka VLADIMIR SERDIUK, DEFENDANT

COMPLAINT—Filed Aug. 15, 1977

Plaintiff, United States of America, by and through its attorney, Vince K. Antle, United States Attorney for the Southern District of Florida, complaining of Defendant, states as follows:

1. This is an action under Section 340(a) of the Immigration and Nationality Act of 1952, as amended (Act), 8 U.S.C. 1451(a), to revoke and set aside the court order admitting the defendant to citizenship and to cancel, the defendant's certificate of naturalization.

2. The affidavit of John W. Price, a Regional Counsel for the Immigration and Naturalization Service, showing good cause for this action, is attached as Exhibit A.

3. The Plaintiff is the United States of America and this court has jurisdiction pursuant to Title 28, United States Code, Section 1345.

4. The last known residence of the defendant, Feodor Fedorenko, is 352 Euclid Avenue, Apt. 8, Miami Beach, Florida, which is within the jurisdiction of this court.

5. The defendant was born in Sivasch, Ukraine, U.S.S.R. on September 17, 1907.

6. The defendant was admitted to the United States for lawful permanent residence on November 5, 1949, pursuant to Section 2(c) of the Displaced Persons Act of June 25, 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948) (prior to 1950 Amendment).

7. On April 23, 1970, the defendant was naturalized under the terms of Section 316(a) of the Act, 8 U.S.C.

1427(a), and became a United States citizen by an order of the Superior Court of the County of New Haven, State of Connecticut, pursuant to his Petition for Naturalization, #7900, and the defendant was issued a Certificate of Naturalization #8841975.

COUNT 1

8. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

9. The defendant resided in Sivasch, Ukraine, U.S.S.R., until 1933; thereafter in Dzhankoy, Ukraine, U.S.S.R. until the beginning of World War II; thereafter in Russia; thereafter in Holmo, Poland; thereafter in Travnicki, Poland; thereafter in Lublin, Poland; thereafter at the Treblinka Concentration Camp, Poland until the end of 1943.

10. In an Application for Immigration Visa and Alien Registration, subscribed and sworn before a Vice Consul of the United States on October 12, 1949, the defendant gave his birthplace as Sarny, Poland, and his nationality as Polish and indicated that his places of residence after reaching age 14 were in Sarny, Poland until 1942 and in Germany from 1942 to 1949.

11. The defendant who then knew his true birthplace and places of residence willfully misrepresented these material facts in order to procure an immigrant visa.

12. The defendant's visa, procured through willful misrepresentation and fraud, was invalid. Because his visa was invalid, he was never lawfully admitted for permanent residence which is a prerequisite for naturalization under 8 U.S.C. 1427(a).

13. Because the defendant did not meet the requirements for citizenship, his naturalization was illegally procured.

COUNT 2

14. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

15. The defendant committed or participated in the commission of crimes or atrocities against civilians in

the Treblinka Concentration Camp in Poland at various times during the years 1942 and 1943.

16. The defendant was not a "Displaced Person" as defined in Section 2(b) of the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), because of the acts alleged in paragraph 15 of this Complaint. Because he was not a "Displaced Person," he was not eligible for the visa issued him under that Act. Because his visa was invalid, he has never been lawfully admitted to the United States for permanent residence, which is a prerequisite for naturalization under 8 U.S.C. 1427(a).

17. Because the defendant did not meet the requirements for citizenship, his naturalization was illegally procured.

COUNT 3

18. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

19. The defendant committed or participated in the commission of crimes or atrocities against civilians in the Treblinka Concentration Camp in Poland at various times during the years 1942 and 1943.

20. Because of the acts alleged in paragraph 19 of this Complaint, the defendant was inadmissible to the United States under the Act of May 22, 1918, Pub. L. 65-154, 40 Stat. 559 (1918) as amended by the Act of June 21, 1941, Pub. L. 77-114, 55 Stat. 252 (1941), pursuant to Presidential Proclamations 2523 of November 14, 1941 and 2850 of August 17, 1949 and the implementing regulations contained in Section 175 of Title 8, C.F.R. Consequently, he has never been lawfully admitted to the United States for permanent residence, which is a prerequisite for naturalization under 8 U.S.C. 1427(a).

21. Because the defendant did not meet the requirements for citizenship, his naturalization was illegally procured.

COUNT 4

22. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

23. In connection with his petition for naturalization, on March 2, 1970, the defendant appeared before a naturalization examiner in Waterbury, Connecticut, for a preliminary investigation with respect to the defendant's Application to File Petition for Naturalization (INS Form N-400).

24. The Form N-400 had previously been completed over the defendant's signature, and during the preliminary investigation the defendant made or requested the making of corrections on the Form N-400, and the defendant then subscribed and swore before the naturalization examiner that the contents of the application as corrected were true to the best of his knowledge and belief.

25. On the same day, March 2, 1970, the defendant, while under oath, approved all the statements he made at the preliminary investigation and swore, among other things, that he was, and had been during all the periods required by law, a person of good moral character (INS Form N-400).

26. The Form N-400 called upon the defendant to disclose whether he had ever knowingly committed any crime outside the United States for which he had not been arrested, to disclose whether he had ever been arrested outside the United States for breaking or violating any law or ordinance, and to disclose his past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and his foreign military service.

27. The defendant had knowingly committed a crime or crimes against civilians in the Treblinka Concentration Camp in Poland at various times during the years 1942 and 1943.

28. The defendant, who then knew of his past criminal activity, willfully failed to disclose the commission of these crimes in the Application to File Petition for Naturalization (Form INS N-400).

29. The fact of the defendant's commission of any of these crimes was material to the good moral character

requirement for naturalization contained in Section 316 of the Act, 8 U.S.C. 1427.

30. The defendant, therefore, procured his naturalization by concealment of a material fact or by willful misrepresentation.

COUNT 5

31. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

32. The defendant had been a member of the German Army, or similar organization, during the years 1941 through 1943 or at some point in time during those years.

33. The defendant, who then knew of his past membership in the German Army, willfully failed to disclose that membership on the Application to File Petition for Naturalization (INS Form N-400), executed under oath on March 2, 1970.

34. The fact of the defendant's membership in the German Army was material to the defendant's petition for naturalization under Section 316 of the Act, 8 U.S.C. 1427.

35. The defendant, therefore, procured his naturalization by concealment of a material fact or by willful misrepresentation.

COUNT 6

36. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

37. The defendant committed or participated in the commission of crimes or atrocities against civilians in Poland at various times during the years 1942 and 1943.

38. The defendant lacked the good moral character required for naturalization under Section 316 of the Act, 8 U.S.C. 1427, because of the commission of these crimes or atrocities.

39. The defendant's naturalization was, therefore, illegally procured.

COUNT 7

40. The plaintiff repeats and realleges paragraphs 1 through 7 of this Complaint.

41. The defendant, who then knew of his membership in the German Army as alleged in paragraph 32 of Count 5, and of his commission of a crime or crimes as alleged in paragraph 15 of Count 2, gave false testimony regarding either or both or these facts when he swore to the truth of the statements contained in the Application to File Petition for Naturalization (INS Form N-400) and when he approved under oath all statements made at the preliminary investigation on March 2, 1970.

42. The defendant lacked the good moral character required for naturalization under Section 316 of the Act, 8 U.S.C. 1427, as defined in Section 101(f)(6) of the Act, 8 U.S.C. 1101(f)(6), because of his false testimony. The defendant's naturalization was, therefore, illegally procured.

WHEREFORE, plaintiff demands:

(1) judgment revoking and setting aside the April 23, 1970 Order of the Superior Court of the County of New Haven, State of Connecticut, admitting the defendant to United States citizenship, and cancelling the Certificate of Naturalization #8841975;

(2) judgment forever restraining and enjoining the defendant from claiming any rights, privileges or advantages under any document evidencing United States citizenship acquired pursuant to the April 23, 1970 Order of the Superior Court of the County of New Haven, State of Connecticut;

(3) judgment requiring the defendant to surrender and deliver his Certificate of Naturalization to the Attorney General immediately; and,

(4) judgment granting to plaintiff such other relief as may be lawful and proper.

Respectfully submitted,

VINCENT K. ANTLE
United States Attorney

By: /s/ Nathaniel H. Speights
NATHANIEL H. SPEIGHTS
Assistant United States Attorney
300 Ainsley Building
14 N.E. - First Avenue
Miami, Florida 33132

STATE OF TEXAS
COUNTY OF DALLAS

AFFIDAVIT OF GOOD CAUSE

JOHN W. PRICE, being duly sworn, deposes and says:

1. That he is an attorney and Regional Counsel in the Southern Regional Office of the IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, Dallas, Texas, and, as such, has access to the official records of said Service from which the following facts appear:

(a) That, on March 2, 1970, one FEODOR FEDORENKO filed a petition for naturalization in the Superior Court of New Haven County, Waterbury, Connecticut; that he was admitted to citizenship by that court on April 23, 1970, and received Certificate of Naturalization No. 8841975.

(b) That the said petition for naturalization of FEODOR FEDORENKO was based upon a lawful admission for permanent residence on November 5, 1949, at Boston, Massachusetts, under Public Law 774 of 1948, Section 6(a) of the Displaced Persons Act.

(c) That the said lawful admission for permanent residence was effected with a visa issued to him by a Vice Consul of the United States, at Hamburg, Germany, on October 13, 1949. As a part of the visa issuing process, some of which involved representations to the United States Displaced Persons Commission, and in order to establish eligibility for the issuance of the visa to him, he testified and stated that he was born in Sarny, Poland, that he resided in Sarny, Poland from 1921 to 1942, that he resided in Pelez, Germany from 1942 to 1945, and that he resided in Hamburg, Germany from 1945 to 1949.

(d) That, in subsequent testimony before an Investigator of the IMMIGRATION AND NATURALIZATION SERVICE, FEODOR FEDORENKO testified that he was born in the village of Sivasch, Ukraine, U.S.S.R., and resided in Sivasch and

Djankoy, Ukraine, Jitomer, Russia, Rovno, Holmo, Travnicki and Lublin, Poland, and in the Treblinka Concentration Camp; that he failed to reveal his true place of birth and true places of residence; and that he intentionally concealed the true facts from the Vice Consul and others in order to facilitate his entry into the United States.

(e) That Section 13 of the Displaced Persons Act, as amended on June 16, 1950, and by its own terms specifically made retroactive, provided that:

"No visas shall be issued under the provisions of this Act, as amended . . . to any person who advocated or assisted in the persecution of any person because of race, religion or national origin . . . If any person not entitled to a visa under this section shall nevertheless gain admission to this country . . ., such person shall, irrespective of the date of his entry be deported in the manner provided by Sections 19 and 20 of the Immigration Act of February 5, 1917, as amended."

(f) That, when applying for his visa to immigrate to the United States, he informed the United States Consular Officer, among other things, that he had never been convicted of nor committed any crime involving moral turpitude; and that he made this statement for the sole purpose of inducing the United States Consular Officer to issue him a visa to enter the United States.

(g) That, in truth and in fact, prior to his application for a visa and contrary to his testimony and representations to Consular and United States Displaced Persons Commission officials and contrary to his testimony and representations regarding birth, residences, and employment, he had:

On September 17, 1907, been born in Sivasch, Ukraine, U.S.S.R., had thereafter resided for twenty-six (26) years (i.e., until 1933, when he went to Djankoy, Ukraine); thereafter, he went to Jitomer, Russia; thereafter, Holmo, Poland; thereafter, Travnicki and Lublin, Poland; and then to the Tre-

blinka Concentration Camp, where he was employed as a guard.

On or about the period between September 1942 and August 1943, in the concentration camp known as Treblinka, while acting as a non-commissioned officer, a leader of the Ukrainian guards, cruelly beat people arriving in railway cars at the camp, because they were Jewish.

On or about the period between September 1942 and August 1943, in the Treblinka Concentration Camp, while acting as a leader of the Ukrainian guards, shot people at the edge of a pit in which a fire was burning so that their bodies fell into the fire, because they were Jewish.

On or about the period between September 1942 and August 1943, in the Treblinka Concentration Camp, while acting as a leader of the Ukrainian guards, went into the woods near the camp to apprehend Jews who were hiding out there, brought the apprehended Jews back to the camp, hung them on a gallows by their feet, and then shot them, because they were Jewish.

On or about the period between October 1942 and August 1943, in the Treblinka Concentration Camp, while acting as a leader of the Ukrainian guards, beat Jewish arrivals with a whip and shot many of the arrivals, because they were Jewish.

On or about the period between October 1942 and August 1943, in the Treblinka Concentration Camp, while acting as a leader of the Ukrainian guards, whipped and beat a man called SCHALOM KOHN and other unnamed Jewish laborers, because they were Jewish.

On or about the period between the fall of 1942 and August 1943, in the Treblinka Concentration Camp, while acting as a leader of the Ukrainian guards, shot at the Jewish men arriving at the camp, shot at the Jews arriving from the Warsaw Ghetto uprising, and shot Jewish laborers to death, because they were Jewish.

(h) That, in truth and in fact, prior to his application for a visa he had assisted in the persecution of persons because of race, religion, or national origin by committing the preceding and other acts against persons of the Jewish faith, while acting as a leader of the Ukrainian guards.

2. That the said FEODOR FEDORENKO did intentionally and deliberately make false statements and representations to Consular and United States Displaced Persons Commission officials for the purpose of obtaining a visa and gaining admission to the United States; and that such false statements and representations did prevent the making of a full and proper investigation regarding his eligibility for a visa.

3. That the said FEODOR FEDORENKO procured his visa and entry into the United States by fraud.

4. That at the time of his entry into the United States on November 5, 1949, at Boston, Massachusetts, the said FEODOR FEDORENKO was not entitled to a visa because of his false statements and representations and, because he had assisted in the persecution of persons because of race, religion, or national origin, was, therefore, not admissible to the United States and was, therefore, deportable under Section 13 of the Displaced Persons Act, as amended on June 16, 1950.

5. That at the time of the filing of his petition for naturalization on March 2, 1970, and at the time of his admission to citizenship on April 23, 1970, Sections 316 (a) and 318 of the Immigration and Nationality Act of 1952, 8 USC 1427(a) and 8 USC 1429, respectively, required that a petitioner be lawfully admitted to the United States for permanent residence.

6. That the said FEOROR FEDORENKO was not lawfully admitted to the United States for permanent residence; thus, he was not entitled to file a petition for naturalization nor entitled to naturalization nor entitled to be admitted as a citizen of the United States.

7. That the naturalization of the said FEODOR FEDORENKO was illegally procured in that he did not satisfy the statutory prerequisite that he be lawfully

admitted to the United States for permanent residence.

8. That, on the date of the filing of his petition for naturalization on March 2, 1970, the said FEODOR FEDORENKO knowingly testified falsely before a Naturalization Examiner that he had never committed any crimes or offenses and that he had never belonged to any organization, association, fund, foundation, party, club, society, or similar group in the United States or any other country, except that he did belong to a labor union in connection with his employment in the United States and that he had served in the Russian military service for a short period of time but did not serve in any other military service at any time.

9. That the false testimony given by the said FEODOR FEDORENKO to the Naturalization Examiner was for the purpose of obtaining a benefit, to-wit: his naturalization.

10. That the false testimony of the said FEODOR FEDORENKO induced the Naturalization Examiner to recommend that his petition for naturalization be granted; that such a favorable recommendation was made to the court and, based on such a favorable recommendation, the court admitted him to citizenship.

11. That at the time the said FEORÓR FEDORENKO filed his petition for naturalization, on March 22, 1970, and at the time of his admission to citizenship, on April 23, 1970, Section 316(a) of the Immigration and Nationality Act of 1952, 8 USC 1427(a), required that he establish good moral character during the five-(5) year period immediately preceding the filing of his petition for naturalization and from the date of the filing of his petition until the date of his admission to citizenship; and Section 101(f)(6) of the Immigration and Nationality Act of 1952, 8 USC 1101(f)(6), provided that no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, has given false testimony for the purpose of obtaining benefits under the Act.

12. That the said FEODOR FEDORENKO intentionally and deliberately made false statements for the purpose of obtaining a benefit under the Act, to-wit:

his naturalization, and intentionally and deliberately concealed material facts in the proceedings which led to his naturalization in order to, and he did, prevent the making of a full and proper investigation of his eligibilty for a visa, his entry into the United States, his eligibility for naturalization, and of his liability to deportation; and he thereby induced the Naturalization Examiner to make a favorable recommendation to the court that his petition be granted and precluded inquiry by the court concerning his qualifications for citizenship, thereby procuring naturalization in violation of law.

13. That, on May 25, 1976, before an Investigator of this Service, the said FEODOR FEDORENKO testified, under oath, that he was born in the village of Sivasch, Ukraine, U.S.S.R.; that upon application for his visa to gain entrance into the United States, he stated he was born in Sarny, Poland, because he feared that he would be sent back to Soviet Russia; that he lived in the village of Sivasch for twenty-six (26) years (i.e., from his birth in 1907 to 1933 when he went to Djankoy in the district of Crimea until the beginning of World War II, when he was drafted into the Russian army; that he was then captured by the Germans and taken to Jitomer, Russia, where he stayed two (2) weeks; that, thereafter, he was taken to Rovno, Poland, where he stayed one (1) week; that, thereafter, he was taken to Holmo, Poland, where he stayed two (2) months; that, thereafter, he was taken to Travniki, Poland, where he stayed eight (8) months; that from there he went to Lublin, Poland, where he stayed about three (3) or four (4) months, after which he was selected to go to Treblinka, where he stayed for about one (1) year; that he was a camp guard at Treblinka Concentration Camp; that he wore a German uniform at the camp, earned pay, and earned the rank of Oberwachmann; that, on May 27, 1976, before an Investigator of this Service, the said FEODOR FEDORENKO testified, under oath, that he had been given formal training by the German armed forces, in Lublin and Travniki, Poland, as a soldier and to be a prison guard and was considered a Private in the German army.

14. That the naturalization of the said FEODOR FEDORENKO was procured by concealment of material facts and willful misrepresentation.

15. That good cause exists for the institution of a suit under Section 340(a) of the Immigration and Nationality Act, 8 USC 1451(a), as amended by Public Law 87-301 on September 26, 1961, to set aside and cancel the naturalization of the said FEODOR FEDORENKO on the ground that it was illegally procured and was procured by concealment of material facts and by willful misrepresentations.

16. That the last known address of the said FEODOR FEDORENKO is 352 Euclid Avenue, Apt. 8, Miami Beach, Florida.

/s/ John W. Price
JOHN W. PRICE
Regional Counsel

SUBSCRIBED AND SWORN TO before me at Dallas, Dallas County, Texas, on this 23rd day of March, 1977.

/s/ Jamie Hull
Notary Public in and for
Dallas County, Texas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 77-2668 VIV-NCR

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FEODOR FEDORENKO, DEFENDANT

ANSWER—February 4, 1978

1. Paragraph 1 is admitted.
2. The defendant admits that the Affidavit of John W. Price is attached as Exhibit A, but denies the remainder of said paragraph.
3. Paragraph 3 is admitted.
4. The defendant denies he was a resident of Florida.
5. Paragraph 5 is admitted.
6. Paragraph 6 is admitted.
7. Paragraph 7 is admitted.

COUNT 1.

8. The defendant repeats his Answers to Paragraphs 1 through 7 of the complaint.
9. Paragraph 9 is denied.
10. As to Paragraph 10 the defendant does not have sufficient knowledge or information to form a belief and therefore leaves the plaintiff to its proof.
11. Paragraph 11 is denied.
12. Paragraph 12 is denied.
13. Paragraph 13 is denied.

COUNT 2.

14. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
15. Paragraph 15 is denied.
16. Paragraph 16 is denied.
17. Paragraph 17 is denied.

COUNT 3.

18. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
19. Paragraph 19 is denied.
20. Paragraph 20 is denied.
21. Paragraph 21 is denied.

COUNT 4.

22. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
23. Paragraph 23 is admitted.
24. Paragraph 24 is admitted.
25. Paragraph 25 is admitted.
26. Paragraph 26 is admitted.
27. Paragraph 27 is denied.
28. Paragraph 28 is denied.
29. Paragraph 29 is denied.
30. Paragraph 30 is denied.

COUNT 5.

31. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
32. Paragraph 32 is denied.
33. Paragraph 33 is denied.
34. Paragraph 34 is denied.
35. Paragraph 35 is denied.

COUNT 6.

36. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
37. Paragraph 37 is denied.
38. Paragraph 38 is denied.
39. Paragraph 39 is denied.

COUNT 7.

40. The defendant repeats his answers to Paragraphs 1 through 7 of this complaint.
41. Paragraph 41 is denied.
42. Paragraph 42 is denied.

FIRST SPECIAL DEFENSE

The plaintiff has waived its right to claim misrepresentation as alleged in Paragraphs 11, 12, 13 and 32, and is estopped from claiming misrepresentation because on April 13, 1967 the plaintiff accepted for its file, corrections as to defendant's nationality, place of birth, residency and Prisoner of War Status, which was prior to the defendant's application for naturalization.

SECOND SPECIAL DEFENSE

The Court lacks venue over this action because the defendant was not a resident of Florida at the commencement of this action.

THIRD SPECIAL DEFENSE

The plaintiff's action is barred by Statute of Limitations.

THE DEFENDANT

By BRIAN M. GILDEA
CELENTANO & GILDEA
His Attorney
265 Church St.
New Haven

Certificate of Service (omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FEODOR FEDORENKO, a/k/a FEODER DIMITRIEVICH FEDORENDO, a/k/a FEODER FEDORENKO, a/k/a VLADIMIR SERDIUK, DEFENDANT

MOTION TO AMEND COMPLAINT—
Filed April 2, 1978

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through the undersigned United States Attorney, and pursuant to Rule 15(a), Federal Rules of Civil Procedure, respectfully moves this Honorable Court for leave to amend its previously filed complaint as follows:

(1) Count 5, paragraph 32, shall read as follows:

The defendant served as an armed guard for the German Army, or similar organization, during the years 1941 through 1943, or at some point in time during those years.

(2) Count 5, paragraph 33, shall read as follows:

The defendant, who then knew of his past service for the German Army, wilfully failed to disclose that service on the Application to File Petition for Naturalization (INS Form N-400), executed under oath on March 2, 1970.

(3) Count 5, paragraph 34, shall read as follows:

The fact of the defendant's service for the German Army was material to the defendant's petition for naturalization under Section 316 of the Act, 8 U.S.C. 1427.

(4) Count 7, paragraph 41, shall read as follows:

> The defendant, who then knew of his service for the German Army as alleged in paragraph 32 of Count 5, and of his commission of a crime or crimes as alleged in paragraph 15 of Count 2, gave false testimony regarding either or both of these facts when he swore to the truth of the statements contained in the Application to File Petition for Naturalization (INS Form N-400) and when he approved under oath all statements made at the preliminary investigation on March 2, 1970.

The plaintiff submits that the purpose of these amendments is to permit the complaint to be altered to conform to the evidence as discovered during depositions. The amendments state no new causes of action and raise no new issues. Justice will be served by allowing these amendments.

Respectfully submitted,

J. V. ESKENAZI
United States Attorney

By: /s/ Don R. Boswell
DON R. BOSWELL
Assistant U.S. Attorney
300 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132
(305) 350-5476

EXHIBIT 1 (b)

Certified Translation

Dres. Wantig, Kauffman
Sieveking, Baur, Harm
Notaries Public

(24a) HAMBURG 1, Bergstr. 11
(Haus Commeter)

Tel.: 32 68 56/57

Dr. B/Pa.

Declaration in Lieu of an Oath

I, the undersigned Feodor Fedorenko, Motor-Driver, residing at Hamburg-Osdorf, DP Camp, make the following declaration in lieu of an oath after the attesting Notary Public explained to me the significance of such a declaration:

I was born in Sarny/Poland, on 17th. September, 1907.

My father, Dimitri Fedorenko, was, as far as I know, born in Sarny in the year 1881. My mother, Anna Fedorenko nee Hubar was, as far as I know, born in Sarny in the year 1883.

As far as I remember my parents were married in Sarny in the year 1905. Both my parents are dead.

I am a Polish-Ukrainian National.

I am no longer in possession of documents referring to my descent and to my birth. They were destroyed by fire in the Camp Pehlitz near Stettin. I am unable to have the documents replaced.

Hamburg, 28th. June, 1949.
(sgd) Fedor Fedorenko

Notarial Register No. 1329/1949.

I, Dr. juris Heinrich Baur, a Notary Public practising in Hamburg, certify hereby that the above signature, subscribed in my presence, is the genuine signature of

Mr. — Feodor (Fedor) Fedorenko, Motor-Driver, residing — at Hamburg-Osdorf, DP-Camp, Identified by Identity Card — No. 311741, issued on 2nd. May, 1949.—

Hamburg, this Twenty-Eighth day of June,
One Thousand Nine Hundred and Forty-Nine—
28th. June, 1949—.

Value: DM 1,000.—
Fee: Paras 26,43,145 Reich Tar. DM 8.—
Turnover Tax .24

DM 8.24 (sgd) B a u r
(sgd) B. (L.S.Not.)

I, Mrs. Paula Mörer, Sworn Translator and Interpreter of the English language in and for the Hansestadt Hamburg, certify hereby that the foregoing is a true and faithful translation of the respective document in the German language submitted to me to-day.

Witness my hand and seal at Hamburg this Twenty-Eighth day of June, 1949.

/s/ Frau Paula Mörer
Frau Paula Mörer

PWDP FORM SC 5

CERTIFICATE OF CHARACTER

(1) IRO	(2) DPACCS	(3) European Case No.
903	CMLO	082847

Mr/Mrs/Miss FEDORE NKO Feodor
(Christian and Family name, Maiden name also for married women)

Registered by IRO 903 ~~DPACCS~~

Born on September 17th, 1907 at Sarny/Poland

Certified for the information of US DP Commission.

Available DPACCS records show no convictions under Mil Gov or German Law*

A/n has been of good conduct whilst a member of this Group.

Signed [signature] Major
O.C.403 BSE (RPC) CMLO (Lab.Group)
OC XXXXXXXX
(Major J.B.A.Bickford)

Date [illegible]

*Delete not applicable

PSS(HQ)R3993D*/60M/4-48.

25

Exhibit 1(e)

European Case No. 82547

XXXX

UNITED STATES

DISPLACED PERSONS COMMISSION

As required under Section 10 of Public Law 774
(Displaced Persons Act) and by Presidential Executive
Order 10003, the following report is submitted in the case of

FEDORENKO, Fedor Applicant Age 41

1. The thorough investigation which has been conducted into the character, history and eligibility of the Applicant, as supported by the statements, certifications and other documents contained in the Commission's files, has established to the satisfaction of the Commission as follows:

Character

that the Applicant is of good character and behavior;

that the Applicant is not and has not been, a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States;

History

that the Applicant was born on 17 September 1907 at Sarny, Poland, and that he is [illegible] the Greek Orthodox faith;

that he received his education at Sarny, Poland, attending Elementary School from 1915 to 1918;

that from 1937 the Applicant was a farmer on his own farm at Sarny, Poland, until March 1942, when he was deported to Germany and employed forcibly as a worker by a factory at Pelez near Stettin until the capitulation in May 1945;

that in May 1945 he fled from Pelez to Hamburg, Germany, where he has been residing until the present time and where he has been employed as a worker by the CMLO since July 1945.

Exhibit 2

European Case No. [illegible]

Eligibility

1. that the Applicant is a displaced person/refugee as defined in Annex 1 of the Constitution of the IRO, and is the concern of that organization;

that the Applicant entered into and was present in one of the Areas, within the appropriate dates, as prescribed in the Act. and on

2. The Commission further states:

that assurances have been given to the Commission on behalf of the Applicant by

Margaret Dikul,
RD 2, Litchfield, Connecticut.

that the assurances are in accordance with the requirements of the Act and regulations have been approved by the Commission, and bear the Commission (Washington) Number D - 14416;

that the Applicant will be employed as a farmhand and that he will reside at

RD 2, Litchfield, Connecticut.

3. By virtue of the foregoing, the Commission finds:

that the Applicant is a displaced person eligible for admission into the United States under Section 2c of the Act, and that such admission would be in accordance with the regulations of the Commission;

that the Applicant is entitled to first preference under Section 6 a of the Act by virtue of the fact that he had been engaged previously in agricultural pursuits and that he is going to the United States as a farmhand needed in the locality where he proposes to reside. He is further entitled to second pricrity under Section 7 +)

4. Therefore, in accordance with Section 700.8 (c) of the regulations, this report is submitted to the Officer of the US Foreign Service at Wentorf Germany, for consideration in connection with the subject's application for an immigration visa.

+) of the Act by reason of the fact that on 1 January 1948 he was employed with the Civil Mixed Labor Organization, a British organization under the control of the occupying authorities.

For the
UNITED STATES DISPLACED PERSONS COMMISSION

Wentorf, Germany
30 August 1949
JRM:ev

James R. Maguire
JAMES R. MAGUIRE
Case Analyst

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Second page
Exhibit 2.

Too hard
Exhibit 5 (a)

UNITED STATES
IMMIGRATION SERVICE
(Bureau of Immigration)

APPLICATION FOR IMMIGRATION VISA AND ALIEN REGISTRATION

No. I- 961434

TO THE AMERICAN CONSULATE AT Hamburg, Germany - Consular Office Wentorf

I, the undersigned APPLICANT FOR AN IMMIGRATION VISA AND ALIEN REGISTRATION, being duly sworn, state the following facts regarding myself:

I claim to be a Displaced Person immigrant and my claim is based on the following facts:

Public Law 774
Report of D.P. Commission attached

Public Law 774 and

Available documents required by the Immigration Act of 1924, as amended, are filed herewith and made part hereof, as follows:

Document in lieu of Birth Certificate
Medical Certificate
Certificate of Character

FULL AND TRUE NAME: FEDORENKO, Feodor

OCCUPATION: Driver

LAST PERMANENT RESIDENCE: CIWS Hamburg, Germany

DATE AND PLACE OF BIRTH: September 17, 1907 at Sarny, Poland

AGE: 42

SEX: M ☐ F ☐

NATIONALITY	RACE	HAIR	EYES	HEIGHT
Polish	white	d.blond	blue	5'8"

MARKS OF IDENTIFICATION: none

FINAL DESTINATION IN UNITED STATES: RD 2 Litchfield, Connecticut

DATES OF PREVIOUS SOJOURN IN THE UNITED STATES: none

THE NAMES AND ADDRESSES OF MY PARENTS ARE:

Mother FEDORENKO, Anna nee HUBAR — Address deceased

Father FEDORENKO, Dimitri — Address deceased

NEITHER OF MY PARENTS IS LIVING AND THE NAME, RELATIONSHIP AND ADDRESS OF NEAREST RELATIVE IN COUNTRY WHENCE I COME IS / //

That I am aware that the Deportation Act of March 4, 1929, provides in part that an alien who enters the United States in an illegal manner, or [illegible] examination or inspection by immigration officials or who obtains entry to the United States by a willful false or misleading representation or willful [illegible] material fact shall be punishable by fine or imprisonment, or both; and that the Immigration Act of 1924 provides in part that a person who knowingly [illegible] with any false statement in any application, affidavit, or other document required by the immigration laws or regulations issued thereunder shall be [illegible] or imprisonment, or both;

That I have had the following excludable classes explained to me, and that, except as hereinafter noted I am not a member of any one of the following classes of aliens excluded from admission to the United States under the immigration laws: (1) idiots; (2) imbeciles; (3) feebleminded; (4) epileptics; (5) insane persons having had previous attacks of insanity; (7) persons with constitutional psychopathic inferiority; (8) persons with chronic alcoholism; (9) [illegible] mental defect; (11) vagrants; (12) persons afflicted with tuberculosis; (13) persons afflicted with loathsome or dangerous contagious disease; (14) [illegible] or, or who admit committing, a crime involving moral turpitude; (15) polygamists; (16) anarchists; (17) persons who believe in or advocate the overthrow by violence of the Government of the United States or the assassination of public officials, or the unlawful destruction of property, or who have ever held such views; (18) persons inadmissible under the provisions of section 3 of the act of February 5, 1917; (19) persons inadmissible under the provisions of section 16, 1918, as amended; (20) prostitutes; (21) procurers; (22) contract laborers; (23) persons likely to become public charges; (24) persons previously excluded, deported and permitted to leave the United States voluntarily under the order of deportation; (25) persons previously excluded from admission [illegible] at a port of entry; (26) persons whose passage paid by another; (27) unaccompanied children; (28) natives of Asiatic barred zone; (29) illiterates [illegible] to citizenship; (30) persons removed from and at the expense of the United States under the provisions of section 23 of the act of February 5 [illegible] who [illegible] to evade military service [illegible] (22) and (27)

That I have had the various exceptions to the foregoing excludable classes explained to me, and that I claim to be exempt from exclusion on account of the [illegible] or classes noted above, for the reasons following, to wit:

ord; (21) polygamists; (22) practicing; (23) contract laborers; (24) persons likely to become public charges; (25) ...
Status at a port of entry; (26) persons whose passage paid by another; (27) unaccompanied children; (28) natives of Asiatic barred zone; (29) ...
ineligible to citizenship; (31) persons removed from and at the expense of the United States under the provisions of section 22 of the act of February ...
who left the United States to evade military service; (32) [illegible]

That I have had the various exceptions to the foregoing excludable classes explained to me, and that I claim to be exempt from [illegible]
or classes noted above, for the reasons following, to wit:

(22) and (26) - exempt under Public Law 774

That I have (not) been in prison or almshouse; I have (not) been in an institution or hospital for the care and treatment of the insane; my (father, mother) (have, has) (not) been in an institution for the care and treatment of the insane; I have (not) been arrested or indicted for, or convicted of, any offense; I have (not) been the beneficiary of a foreign pardon or amnesty, to wit: ///

That within the past 5 years I have (not) been affiliated with or active in (a member of, official of, a worker for) organizations devoted in whole or in part to influencing or furthering in the United States the political activities, public relations, or public policy of any other government. ///

That since reaching the age of 16 years I have resided at the following places, during the periods stated, to wit:

1921-1942 at Sarny,Poland, 1942-1945 at Pelez, Germany, 1945-1949 at Hamburg,Germany

That I am (married, single) and the name of my (husband/wife) is /// who was born at ///
; and resides at ///

That the names, dates of birth, and places of residence of my minor children are: ///

That I am able to speak, read and write the following languages or dialects: Polish, Russian and Ukrainian

That my port of embarkation is Bremerhaven ; I shall enter the United States at the port of New York, N.Y. ; I do (~~do not~~) have a ticket through to my final destination in the United States; my passage was paid for by International Refugee Organization or address is Geneva, Switzerland

That I intend to join (relative, friend) Mrs. Margaret DIKUL whose address is RD 2, Litchfield, Connecticut

That the names and addresses of other close relatives in the United States are: ///

That my purpose in going to the United States is to reside my occupation will be farmhand ; I intend to engage in the following activities there: farming

I intend to remain (permanently, temporarily) ; my education Elementary School 3 yrs.

That I have (not) applied for an immigration or passport visa at any American Consulate, either formally or informally.

WHEREFORE, I apply for an Immigration Visa pursuant to the provisions of the Immigration Act of 1924, as amended, and Public Law 774

[seal]

Subscribed and sworn to before me this 12 day of October 1949

Bottom half (a) EXHIBIT

(Rev. 9-8-44)

Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention

☞ *Take or mail this application to—*
IMMIGRATION AND NATURALIZATION SERVICE,
POST OFFICE BUILDING, HARTFORD, CONN.

Date November 21st 1950

ALIEN REGISTRATION NO. [redacted]

STATEMENT OF FACTS TO BE USED IN MAKING MY DECLARATION OF INTENTION

READ CAREFULLY AND FOLLOW THE INSTRUCTIONS ON PAGE 2

(1) My full name is Feodor Dimitrievich Fedorenko

(2) My place of residence is 50 Columbia Blvd. Waterbury Conn.

(3) My occupation is laborer at Waterbury Clarke Co. (4) I am [illegible] years old.

(5) I was born on September 12th 1901 in Novaya, Yelizavetinskaya Chkalovsk Ukraine

(6) My personal description is as follows: Sex Male color White complexion [illegible] color of eyes Blue color of hair Dark Brown height 5 feet 10 inches; weight 170 pounds; visible distinctive marks None race Ukrainian present nationality Ukranian

(7) I am not married; the name of my wife or husband is [illegible]
we were married on [illegible] at [illegible]
he or she was born at [illegible] on [illegible]
and entered the United States at Boston Mass. on November 8th 1949
for permanent residence in the United States, and now resides at 50 Columbia Blvd. Waterbury, Conn.

(8) I have no children; and the name, sex, date, and place of birth, and present place of residence of each of said children who is living are as follows:

(9) My last place of foreign residence was Hamburg S/H Germany

(10) The place where I took the ship or train which landed me in the United States was Germany

(11) My lawful entry for permanent residence in the United States was at Boston Mass. under the name of Feodor Fedorenko on Nov. 8th 1949 on the Ship General Balfour

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Port	Date (Month, day, year)	Vessel or Other Means of Conveyance	Port	Date (Month, day, year)	Vessel or Other Means of Conveyance
			Ulc [illegible]	[illegible]	[illegible]

(13) I have not heretofore made declaration of intention number [illegible] on [illegible] at [illegible] in the [illegible]

(14) My father's full name is/was Dmitry A. Fedorenko

(15) My mother's maiden name was Anna K. Mihar

(16) The person in the United States to whom I was coming was Mrs. Margarita Pikul

(17) The place in the United States to which I was going was Litchfield, Conn.

(18) The names of some of the passengers or other persons I traveled with including members of my own family, and their relationship to me, if any, are Mr. Roman Brezovsky, Naugatuck, Conn. - Passenger on Ship

(19) I have the following United States Military or Naval Service [illegible]

I CERTIFY that the above statement of facts is true to the best of my knowledge and belief.

Feodor Fedorenko
(Name of applicant)

50 Columbia Blvd. Waterbury Conn.
(Address of applicant)

NOTE—Have you enclosed THREE PHOTOGRAPHS OF YOURSELF?

I desire to declare my intention to become a citizen of the United States in the [illegible] Court at Waterbury Connecticut

NOTE TO CLERK OF COURT.—The facts of arrival, one data in Form N-210 A, N-228 A, or N-318, whichever is attached hereto. Form N-218 A, N-228 A, or N-213 and this statement-of-facts form should be attached to the duplicate declaration and returned at the end of month to the immigration and naturalization office at the address given above.

4/50

16—11312-3

Exhibit 4

INSTRUCTIONS TO THE APPLICANT

This form must be completely filled out (preferably on the typewriter)

When Declaration Not Required.—You are not required to file a declaration of intention to become a citizen of the United States if you are—

(a) An alien who has served honorably for 3 years in the United States Army, Navy, Marine Corps, or Coast Guard, or for 5 years on board any vessel of the United States Government other than the Navy, Marine Corps, or Coast Guard, or on board vessels of more than 20 tons burden which are not foreign vessels and whose home port is in the United States, provided your petition is filed while you are still in such service or employment, or within 6 months after leaving such service or employment.

(b) An alien who married a citizen of the United States or whose spouse was naturalized on or subsequent to September 22, 1922; or

(c) A woman who, prior to September 22, 1922, lost your American citizenship by: (1) marriage to an alien or through the loss of American citizenship by your husband, or (2) by marriage to an alien ineligible to citizenship after September 22, 1922.

(d) An alien who has served honorably in an active duty status in the military or naval forces of the United States during either World War I (April 6, 1917, to November 11, 1918), or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions.

Immigrant Identification Cards and Alien Registration Receipt Cards.—Every alien who entered the United States for permanent residence on the basis of an immigration visa on or after July 1, 1928, and prior to August 27, 1940, should be in possession of an Immigrant Identification Card. Every alien in the United States should be in possession of an Alien Registration Receipt Card. You need not forward either card with this application. However, you will be required to present these cards when you appear to file your petition for naturalization and to surrender them at the time you are admitted to citizenship. You should therefore carefully save your Immigrant Identification Card and your Alien Registration Receipt Card.

Photographs.—You are required to send with this application three identical photographs of yourself taken within 30 days of the date of this application. These photographs must be 2 by 2 inches in size, and the distance from top of head to point of chin should be approximately 1¼ inches. They must not be pasted on the cards or mounted in any other way, must be on thin paper, have a light background, and clearly show a front view of your face without hat. Snapshots, group or full-length portraits will not be accepted. All of these photographs must be signed by you on the margin and not on the face or the clothing.

Date of Your Arrival.—If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot obtain this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them in the appropriate blank spaces on the first page of this form. Your Immigrant Identification Card or your passport, ship's card, or baggage labels, if you have them, may help you to answer these questions.

If the date of your arrival in the United States was on or before June 29, 1906, you should submit with this application documentary evidence of your residence in the United States prior to that date. Such documents may be family bible entries, deeds of record, wills or other authentic legal documents, life insurance policies, bank books and records, employment records or other documents showing that you entered the United States on or before June 29, 1906. Do not submit such documents if your arrival in the United States was after June 29, 1906.

Absence From the United States.—In statement No. 12 on first page show only your absences which were for 6 or more months. Absence from the United States for more than 6 months but less than 1 year during the periods of continuous residence required in the United States may break the continuity of your residence for naturalization purposes. An absence from the United States of 1 year or more during such periods will break the continuity of your residence for naturalization purposes, except that after you have resided in the United States for at least 1 year and have filed a declaration of intention, if your absence abroad is made necessary because you are an employee of the United States Government, an American institution of research, or an American firm or corporation engaged in foreign trade and commerce of the United States, you may prevent a break in the continuity of your residence for naturalization purposes by making an application on Form N-470. For complete information you should address the office of this Service nearest to you, or the "Commissioner of Immigration and Naturalization, Washington, D. C."

Nationality and Race.—Nationality in statement No. 6 on first page refers to the country of which you are a citizen or subject. As to "race" in the same statement, Section 303 of the Nationality Act of 1940 provides that only white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere are eligible for naturalization. There are certain exceptions, in the case of native-born Filipinos who have served honorably in the United States Army, Navy, Marine Corps, or Coast Guard for a period of at least 3 years, and in the cases of women who have lost citizenship through marriage.

Military or Naval Service.—If you have served in the armed forces of the United States at any time, give the date of enlistment or induction, the branch of the service in which you served, the date of discharge and the nature of the discharge received.

PENALTY FOR FALSELY SWEARING IN NATURALIZATION CASES

It is a felony, punishable by a fine of not more than $5,000 or imprisonment for not more than 5 years, or both, for an alien or other person, whether an applicant for naturalization or citizenship, or otherwise, knowingly to make a false statement under oath either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship. (18 U. S. Code 1015 (a).)

U. S. GOVERNMENT PRINTING OFFICE 16—11319-4

RECEIVED
DEC 23 1950

13

Reverse side
Exhibit 4

RECEIVED
IMMIGRATION AND NATURALIZATION SERVICE
OCT 7 1969 P.M.
Aliens Immigration 1 2 3 4 5 6

Re REGISTRATION
(Show the exact spelling of your name, the number and the date of issue of your registration card, and the number of your child's registration card, if any.)
Name FEDORENKO FEODOR
No. 7333469

APPLICATION TO FILE PETITION FOR NATURALIZATION

(READ INSTRUCTIONS, page 5. BE SURE YOU UNDERSTAND EACH QUESTION BEFORE YOU ANSWER IT.)

I desire to file a petition for naturalization in the— Date: Oct. 4, 1969

Superior (Name of Court) Court at Waterbury (City) Connecticut (State)

My name is FEDORENKO FEODOR (Print or type here your present full name only)

I live at: 439 Bound Line Road, Wolcott (Print or type present apartment number, street address, and if appropriate "in care of")

Wolcott (City) New Haven (County) Connecticut (State) 06716 (ZIP Code)

Other names I have used are: None (Print or type here any other name you have ever used, including maiden name)

My present occupation is Wire Mill Operative Sex: ☒ Male ☐ Female

(1a) Was your father or mother ever a United States citizen? (If "Yes" explain fully separately) ☐ Yes ☒ No

(1b) Can you read and write English? ☒ Yes ☐ No

(1c) Can you speak English? ☒ Yes ☐ No

(1d) Can you sign your name in English? ☒ Yes ☐ No

(2) In what places in the United States have you lived during the last 5 years? List present address FIRST.

From—	To—	Street Address	City and State
(a) June, 1968	Present Time	439 Bound Line Road	Wolcott Conn.
(b) June, 1962	June, 1968	17 Brewster St.	Waterbury Conn.
(c) , 19	, 19		
(d) , 19	, 19		
(e) , 19	, 19		

(3) What were the names, addresses, and occupations (or types of business) of your employers during the last 5 years? (If none, write "None.") List present employment FIRST.

From—	To—	Employer's Name	Address	Occupation or Type of Business
(a) Aug., 1953	Present Time	Scovill Manf. Co.	Waterbury	Wire Mill Op.
(b) , 19	, 19			
(c) , 19	, 19			
(d) , 19	, 19			

(4) Have you been out of the United States since you first arrived? ☐ Yes ☒ No

If "Yes" fill in the following information for every absence of *less than 6 months*, no matter how short it was.

Date Departed	Date Returned	Name of Ship, or of Airline, Railroad Company, Bus Company, or Other Means Used to Return to the United States	Place or Port of Entry Through Which You Returned to the United States
		None	

(5) How many times have you been married? 2 How many times has your husband or wife been married? 2 If either of you has been married more than once, fill in the following information for each previous marriage.

Date Married	Date Marriage Ended	Name of Person to Whom Married	Sex	(Check one) Person Married Was Citizen ☐ Alien ☐	How Marriage Ended
(a) Jan. 31 1930	July 23 1942	Dawanko Annex Paraska	F	☐ ☒	Death (Divorce)
(b) Mar. 27 1957	Dec. 29 1961	Barkus Anna	F	☐ ☒	Death
(c) [illegible]	1964	Elizabeth Zaremba	F	☐ ☒	Death
(d)				☐ ☐	

Form N-400 (Rev. 5-1-67) (1) (OVER)

Exhibit 7(a)
page one

...ses, crimes, even though you may not have ... arrested therefor. Have you ever, in or outside ... United States:

(a) Knowingly committed any crime for which you have not been arrested? ☐ Yes ☒ No

(b) been arrested, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations? ☐ Yes ☒ No

If you answer "Yes" to (a) or (b), give the following information as to each incident.

When	Where (City) (State) (Country)	Nature of Offense	Outcome or Case, if Any
(a)			
(b)			
(c)			
(d)			
(e)			

(7) List your present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service. (If none, write "None."

(a) Russian Military Service, 1941 to 1941

(b) Labor Union at work, 1957 to 1968

(c) ..... 19 ..... to 19 .....

(d) ..... 19 ..... to 19 .....

(e) ..... 19 ..... to 19 .....

(f) ..... 19 ..... to 19 .....

(g) ..... 19 ..... to 19 .....

(8) (a) Are you now, or have you ever, in the United States or in any other place, been a member of, or in any other way connected or associated with the Communist Party? ☐ Yes ☒ No

(b) Have you ever knowingly aided or supported the Communist Party directly, or indirectly through another organization, group, or person? ☐ Yes ☒ No

(c) Do you now or have you ever advocated, taught, believed in, or knowingly supported or furthered the interests of, Communism? ☐ Yes ☒ No

(9) Have you borne any hereditary title or have you been of any order of nobility in any foreign state? ☐ Yes ☒ No

(10) Have you ever been a patient in a mental institution, or have you ever been treated for a mental illness? ☐ Yes ☒ No

(11) Are deportation proceedings pending against you, or have you ever been deported or ordered deported, or have you ever applied for suspension of deportation or for preexamination? ☐ Yes ☒ No

(12) Do you owe any Federal taxes? ☐ Yes ☒ No

State last year for which you filed a Federal income tax return. 1968 1968

(13) Have you ever represented yourself to be a United States citizen? ☐ Yes ☒ No

(14) (a) Have you ever deserted from the military, air, or naval forces of the United States? ☐ Yes ☒ No

(b) If male, have you ever left the United States to avoid being drafted into the Armed Forces of the United States? ☐ Yes ☒ No

(15) The law provides that you may not be regarded as qualified for naturalization if, at *any* time during the period for which you are required to prove good moral character, you believed in polygamy or have been a polygamist; have received most of your income from illegal gambling; have committed adultery; have been a prostitute or have procured anyone for prostitution; or have been a drug addict or have dealt illegally in drugs. Have you *ever, anywhere*, been such a person or committed any of these acts? ☐ Yes ☒ No

(16) Do you believe in the U.S. Constitution and form of Government of the United States? ☒ Yes ☐ No

(17) Are you willing to take the full oath of allegiance to the United States? (See Instructions) ☒ Yes ☐ No

(18) If the law requires it, are you willing:

(a) to bear arms on behalf of the United States? ☒ Yes ☐ No

(b) to perform noncombatant services in the Armed Forces of the United States? ☒ Yes ☐ No

(c) to perform work of national importance under civilian direction? ☒ Yes ☐ No

(19) (a) If male, did you ever register under United States Selective Service laws or draft laws? ☐ Yes ☒ No

If "Yes" give date ....; Selective Service No. ....; Local Board No. ....; Present classification ....

(b) Were you ever exempted from service because of conscientious objections, alienage, or other reasons? ☐ Yes ☒ No

If "Yes," state reasons ....

(20) If serving or ever served in the Armed Forces of the United States, give branch ....;

from ....., 19 .... to ....., 19 ...., and from ....., 19 .... to ....., 19 .....

☐ inducted or ☐ enlisted at ....; Service No. ....;

type of discharge .... (Honorable, Dishonorable, etc.); rank at discharge ....;

reason for discharge .... (alienage, conscientious objector, other)

☐ Reserve or ☐ National Guard from .... 19 .... to ....

Exhibit 7(a)
page 2

STATEMENT OF FACTS FOR PREPARATION OF PETITION

Name FEDORENKO, Feodor
No. 7865188

SECTION OF LAW Sec 311a

(10) (1) My full, true, and correct name is Fedorenko Feodor (Full, true, and correct name)

(11) (2) My present place of residence is 439 Round Line Road Wolcott Conn. (Number and street) (City or town) (State)

(12) (3) I was born on Sep. 17 1907 in Dzhankoy Crimea Ukr. S. S. R. (Month) (Day) (Year) (City or town) (County, district, province, or State) (Country)

(13) (4) I am widower (Single, married, widower, divorced) and have 2 living children. (14) The first name of my husband or wife is (was) Anna nee Backi

(15) we were married on Aug. 31 1930 (Month) (Year) at (16) Warsaw Poland (City or town) (State or country);

he or she was born at (17) Dzhankoy Crimea Ukr. S. S. R. (City or town) (County, district, province, or State) (Country)

on (18) Sep. 1911; entered the United States at (19) Newark N.J. (Month) (Year) (City or town)

Nov. (20) XXX. 1949 (State) on (Month) (Day) (Year) for permanent residence in the United States and

now resides ☐ with me ☒ apart from me at (21) 25 Zavodska St. Dzhankoy, Crimea, Ukr. S. S. R. (Show full address if not living with you);

(22) He was naturalized on (Month) (Day) (Year) at (City or town) (State)

Certificate No. or became a citizen by

(5) I was lawfully admitted to the United States for permanent residence on Nov. 5 1949 (Month) (Day) (Year);

under the name of FEDOR Fedorenko Feodor at Boston Mass. (City) (State)

(24) on the C.C. USAT General Ballou. (Name of vessel or other means of conveyance)

(25) (6) I have resided continuously in the United States of America since Nov. 5 1949 and continuously in the

(26) State of Connecticut where I now live since 1949 and during the past

(27) years I have been physically present in the United States for an aggregate period of 809 60 months.

(7) I (have, have not) previously filed petition for naturalization No. on (Month) (Day) (Year)

at (City) (State) in the Court.

(8) I wish the naturalization court to change my name to None (Give full name desired or state "None")

(9) Since such lawful admission, I have not been absent from the United States *for a period or periods of 6 months or longer* except as follows (if none, state "None"): None

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Port	Date (Month, day, year)	Vessel or Other Means of Conveyance	Port	Date (Month, day, year)	Vessel or Other Means of Conveyance

(10) My children now living are: (Complete all columns as to each child. If child lives with you, state "with me" in last column; otherwise, give city and state of child's residence.)

Name	Sex	Place Born	Date Born	Now Living At—
Ivan	M	Ukr. S S R	1930	Ukr. S S R.
Viktor	M	"	1934	"

Exhibit 7(a)
page 3

(12) My last place of foreign residence was Tiefburg- Ostdorf (City) Germany (Country)

(13) My father's full name is Fedorenko Dmitry

(14) My mother's maiden name was Anna 11/13/72

(15) I came to the United States from the port of Bremen-Haffen (City) Germany (Country)

(16) The person in the United States to whom I was coming was Margaret Pikul

(17) The place in the United States to which I was going was R.D.2 Litchfield Conn.

(18) The names of some of the passengers or other persons I traveled with, including members of my own family and their relationship to me, if any, were Teodor Sofranow (friend)

Signature of person preparing form, if other than applicant.

I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge.

SIGNATURE: Roman Domenchuk

ADDRESS: 70 Charles Drive Wolcott. Conn.

DATE: Oct. 4. 1969

SIGNATURE OF APPLICANT: Teodor Fedorenko

ADDRESS AT WHICH APPLICANT RECEIVES MAIL: 439 Bound Line Road, Wolcott, Conn. 06716.

TO APPLICANT: DO NOT FILL IN BLANKS BELOW THIS LINE.

NOTE CAREFULLY.—This application must be sworn to before an officer of the Immigration and Naturalization Service at the time you appear before such officer for examination on this application.

AFFIDAVIT

I do swear that I know the contents of this application comprising pages 1 to 4, inclusive, ~~and the supplemental forms thereto, No(s).~~ ....., subscribed to by me; that the same are true to the best of my knowledge and belief; that corrections numbered (/) to (24) were made by me or at my request; and that this application was signed by me with my full, true, and correct name, SO HELP ME GOD.

Teodor Fedorenko
(Complete and true signature of applicant)

Subscribed and sworn to before me by applicant at the preliminary investigation (Waterbury, Conn.) at .....

this MAR 2 - 1970 day of ....., 19.....

I certify that before verification the above applicant stated in my presence that he had (heard) ~~read~~ the foregoing application, corrections therein and ~~supplemental forms~~ and understood the contents thereof.

(Naturalization examiner)

MAR 2 - 1970 Mehr dement alteht
(For demonstration of applicant's ability to write)

(1st witness) ROMAN DOMENCHUK Occupation machinemaker
residing at 70 CHARLES DRIVE WOLCOTT
(Street address, city or town, and State)

(2d witness) DANIEL BEZUFF Occupation retired
residing at 55 CORTLAND AVE Waterbury
(Street address, city or town, and State)

U.S. 3/1/65 State 3/1/65 Physical presence 31 mos. 7
(Naturalization examiner)

ARRIVAL RECORD FOUND	ARRIVAL RECORDS EXAMINED
Place	Card index
Name	Index books
Age	Manifests
Date Marital status	
Manner	(Signature of person making search)

Notified
(Dates, reasons, and examiner's initials)

35

Exhibit 7(a)
page 4

Exhibit 11

UNITED STATES OF AMERICA

TO BE FORWARDED TO
IMMIGRATION AND NATURALIZATION SERVICE

No. 8841975

PETITION FOR NATURALIZATION

Petition No. 7900

·DUPLICATE·

Personal description of holder as of date of naturalization: Date of birth September 17,1907 sex Male complexion Medium color of eyes Blue color of hair Gray height 5 feet 8 inches; weight 180 pounds; visible distinctive marks None
Marital status WIDOWER Country of former nationality Ukraine
I certify that the description above given is true, and that the photograph affixed hereto is a likeness of me.

Feodor Fedorenko
(Complete and true signature of holder)

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN } ss: WATERBURY

Be it known that at a term of the SUPERIOR Court of the COUNTY OF NEW HAVEN, STATE OF CONNECTICUT held pursuant to law at WATERBURY, CONNECTICUT on APRIL 23, 1970 the Court having found that ------Feodor Fedorenko - - - then residing at 439 Bound Line Road, Wolcott, Connecticut intends to reside permanently in the United States (when so required by the Naturalization Laws of the United States), had in all other respects complied with the applicable provisions of such naturalization laws, and was entitled to be admitted to citizenship, thereupon ordered that such person be and he was admitted as a citizen of the United States of America.

In testimony whereof the seal of the court is hereunto affixed this 23rd day of APRIL - - - Seventy - - - in the year of our Lord nineteen hundred and

FRANCIS J. BUTLER
SUPERIOR
Clerk of the Court.
By Gertrude L. Benson Deputy Clerk.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
EXCERPTS FROM NON-JURY TRIAL TRANSCRIPT

EXCERPTS FROM TESTIMONY OF
KEMPTON JENKINS

DIRECT

[715] Q In addition to any access documents, have you had occasion to study and read Russian documents on that period?

A Yes, I did that mostly after the fact of having been a vice consul there, but I have since continued to pursue my interest in this field and read whatever is available; and when I was in the Soviet Union, of course, I was exposed to the Soviet interpretation of events at that time, which I took with a large grain of salt, of course, but I think I am familiar with the Soviet point of view, shall we say.

Q In regard to the application of the Displaced Persons Act, in Europe after the Second World War, to your knowledge, how many persons are there in the United States who would possess as much knowledge about that application as yourself?

A Well, there were approximately 35 or 40 vice consuls who had the same responsibilities as I did, so I think that would have to be the principal cadre of specialists on this particular fine part of the general history.

MR. COUVILLON: Your Honor, unless there is voir dire, I would proffer Mr. Jenkins as an [716] expert on the Displaced Persons Act, its application as well as the sociopolitical situation in Central Europe immediately after the Second World War.

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[724] * * *

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Q Was it the attitude then, based upon this training and experience, of the various consular officers such as yourself, to grant, freely grant visas wherever possible?

A We were prone to take for granted—we were prone to give the benefit of the doubt to individuals who appeared before us. * * *

* * * *

[734] THE COURT: Any objection to the witness?

MR. POMEROY: No objection, Your Honor.

THE COURT: Very well. We will proceed on the basis of being an expert in this area.

Please proceed.

* * * *

[766] BY MR. COUVILLON:

Q Mr. Jenkins, if either of those documents had stated that the applicant had served as a guard at any concentration or death camp in occupied Poland during the war what would you have done?

A I would have immediately—

MR. POMEROY: Your Honor, objection. It calls for speculation again.

MR. COUVILLON: Does not, Your Honor. He is an expert witness. The hypothetical question is certainly within the realm of competency of the expert witness.

THE COURT: I will permit the answer.

What was the answer?

THE WITNESS: The answer is if there is any indication that the man had served or been involved in any of the concentration camps that we would have stopped the case right there, suspended it, and called for a further investigation by the CIC and the other resources we had available and I would of course interrogate the applicant in some [767] depth and with some vigor at that point, and then after I had received whatever information I could dig up I would have reinterrogated at that point.

Q If through investigation or interview you had determined that the applicant in fact did serve at a death camp or a concentration camp in occupied Poland as a

Ukrainian Guard would you have denied the visa application?

A Yes, I would.

Q And in your expert opinion would such a person have qualified as an eligible displaced person?

A No, he would not have.

Q I may have asked this question, if I have permit me to ask it again, Your Honor, but are you aware of any case whatsoever in which an axis auxiliary who served in a capacity as a camp guard was ever legally qualified as a displaced person?

A No, I am not. I am reasonably certain that there was no such case.

MR. COUVILLON: With your indulgence, Your Honor.

BY MR. COUVILLON:

Q Mr. Jenkins, referring to the last * * *

* * * *

[778] Q Let's clear the air on this now, Mr. Jenkins. You don't have any personal knowledge, do you, of what was done concerning Mr. Fedorenko or of Mr. Fedorenko's application, interviews, reports, et cetera, is that correct?

A No personal knowledge of this specific case, other than my own knowledge of the process.

Q In other words, you are here testifying today as to what is generally done?

A That is correct. That is correct.

Q Do you know who the consul was who interviewed Mr. Fedorenko?

A No, I do not. I saw the name on the visa application provided to me today, but it is not somebody I know and I can't really read the writing. It might be somebody I know but it is a rather tattered document.

* * * *

[791] Q Do you have any particular knowledge of the camp at Treblinka?

A No, I do not, not as distinct from the other camps. Dachau was the camp that I knew the most, because it

was located outside of Munich and we all saw that camp.

Q Was there a difference, to your knowledge, between the camps, the severity of the camps, possibly, or organizations of the camps as they were located farther and farther away from Germany?

A I don't know that. * * *

* * * *

[806] Q Do you have any knowledge what the position was of the consul who actually okayed or authorized or issued the visa to Mr. Fedorenko?

A No, I do not.

* * * *

EXCERPTS FROM TESTIMONY OF
FEODOR FEDORENKO
DIRECT

* * * *

[1315] Q Did you ever wear any color uniform other than the black uniform at Treblinka?

A Never, no kind, only black.

Q What kind of insignia did your uniform have on it?

A There was no insignias.

Q Did they have any kind of stripes on it?

A On the shoulders, on the epaulet. I had a stripe. That meant I was a good soldier, that I was well disciplined, and I served well, that I didn't disobey any laws, that I wasn't drunk.

Q Did that stripe mean rank?

A Because you can't speak German, this doesn't mean anything.

Q Then you are saying, unless you can speak German, you didn't get any rank?

A You can get rank for good behavior.

Q Well, did these stripes mean any kind of rank to you?

A I don't think so.

Q Did these stripes give you the authority to order any other guards around?

A They did not mean that I could give [1316] out orders. What I meant, that if Rohoza ordered me to take a group of men to change a shift, I would do such.

Q Did other guards, Soviet guards, have these stripes?

A There was many who didn't have—There was very few that didn't have, excuse me.

Q Very few that did or did not?

THE INTERPRETER: Did not have the stripes.

BY MR. POMEROY:

Q Very few did not have the stripes?

A Maybe thirty person.

Q Did not have the stripes?

A Yes. The ones that didn't walked around dirty, partied a lot, were drunk.

Q The ones who did not have the stripes?

A That's correct.

THE COURT: What was the first thing, they walked around—

THE INTERPRETER: The ones that were dirty, walked around, were drunk, always—

[1317] BY MR. POMEROY:

Q How did these guards get alcohol to get drunk?

A They got leave, and they bought.

THE COURT: Pardon?

A They got leave, and bought some alcohol.

Q Was this black market?

A Yes. In the camp, they never allowed you to drink.

Q When they got leave, where did they go?

A To the town, to the Polish.

* * * *

[1330] Q Or a German?

A Me saying something to a German? He would holler at me or something.

Q Do you recall the uprising of August, 1943?

A Yes.

Q Can you tell us what you recall of that uprising?

A I was standing guard on the first gate, flames started and shots fired all around, couldn't be understood who and where the shots were coming from.

The comandant ran out and one or two Germans and us watchmans, we fell down on the ground and laid there and then we saw some running away and they ordered us to shoot, but this was far away from us.

Q Did you shoot?

A Yes, I shot. I had to shoot.

Q Did you hit anyone?

A I don't think that anybody from the group killed anyone.

Q Was the commandant right there with you?

[1331] A Yes, laid there on the ground with us. He was shaking that way.

Q He was shaking that way? What does that mean?

A Because shots are going off, nothing is understood.

Q How did you understand that the commandant was ordering you to shoot?

A There was—The commandant didn't tell us to shoot. There were one or two zugwachmann there, maybe ten people.

Q To your knowledge, did any of the Soviet guards assist the Jewish prisoners in preparing for this uprising by selling them arms?

A I think so. This was very secretive.

Q Do you know who sold or traded guns to the Jewish prisoners?

A There may be one or two people work this.

Q Do you know their names, names of either?

A One name. Biernacki, maybe others like this. It is hard to say.

* * * *

[1440] Q You arrived in Treblinka in August or September, 1942, correct?

A Yes, in August, '42, yes, sir.

Q And you had your black uniform with a tie that the Germans had given you, is that correct?

A That's correct.

Q When you arrived, you weren't chased out of the railroad car with a whip, were you?

A No, they didn't run us out. They said, get out, and we got out.

Q As a matter of fact, when you first arrived at Treblinka, weren't you given a few days to rest?

A One, maybe two.

Q One or two days to rest, correct?

A Yes.

Q And then you were issued a rifle, weren't you?

A That's correct.

Q Weren't you also issued a pistol?

A Nobody was issued a pistol, except for the zugwachmann.

Q What about you, Mr. Fedorenko?

A They gave us some after five or [1441] six months.

Q So you were issued a pistol, weren't you?

A Of course, I didn't steal one.

Q And only the zugwachmann were issued pistols, correct?

A Correct.

[1442] Q How long were you at Treblinka when you first saw the Jewish prisoners arrive in the transport?

A This, I don't remember.

Q Was it about a week after you got there when you first saw the Jewish prisoners arrive in the transports?

A I think so. Four, five days, a week.

Q These were not military prisoners but civilians, men, women and children civilians, the Jewish people who arrived; right?

A That's correct.

Q And you knew, didn't you, that these Jewish men, women and children who were being brought to Treblinka were destined to die, didn't you?

A Yes, I heard from my friends.

Q Isn't it true that when these transports arrived bringing new Jewish prisoners, men, women and children, that they were forced out of the trains with sticks and whips?

A I didn't see this.

Q Did you know that they were beaten with sticks and whips when they arrived?

A I was very little at the platform where they unloaded. When they opened the doors, the Germans [1443]

and the zugwachmannen would start yelling "get out," then they would accompany them and direct them to where they wanted them to go after they left the trains.

Q The Germans and the zugwachmannen did that; correct?

A That's correct.

Q Weren't you one of the zugwachmannen that assisted the Germans in doing that to the Jewish people at the transports?

A First, I wasn't a zugwachmann.

Second of all, I was only there as a guard with a rifle.

Q Did any of these Jewish prisoners who arrived who were destined to die have a Star of David armband on?

A I didn't see many. There were men, women had this on.

Q They weren't armed with weapons were they?

A Of course, they weren't. I didn't check them.

Q By saying "I didn't check them," are you suggesting to this Court that you thought they might be armed?

A When the people came and they got unloaded, [1444] and what can I say about them?

Q Approximately how many Russian or Ukrainian guards were there at Treblinka?

A I don't know exactly. I think around, right around a hundred twenty to a hundred fifty. When we arrived, there were some there. How much was there, I don't exactly know.

Q Approximately how many volksdeutsche were at Treblinka?

A Volksdeutsche, maybe twelve. One or two more maybe. I don't know.

Q And the Russian or Ukrainian guards and the volksdeutsche were all armed, weren't they?

A Yes.

[1445] Q Either with rifles, pistols, whips, or a combination of all of those, correct?

A In the beginning, the guards didn't have pistols or whips. After five or six months, then they got issued pistols.

Q They had rifles from the beginning, didn't they?

A That's correct.

Q Now, approximately how many German soldiers were there at Treblinka when you were there?

A Very hard to say, maybe twenty or thirty. There were some left, some came, some would leave on vacation.

Q So there were between one hundred and twenty and a hundred fifty Russian armed guards, and between twenty and thirty Germans at Treblinka, correct?

A That's correct.

Q There was never an armed uprising by the Ukrainian guards against the Germans when you were there, was there, Mr. Fedorenko?

A No, there wasn't.

* * * * *

[1452] Q Weren't all Jewish prisoners brought to Treblinka either put to work or killed, one or the other?

A Yes, that's correct. Ones they made work and the other ones they killed.

Q There weren't any old and sick people there, were there? They were all killed, weren't they? The old and the sick?

A Yes, there was no old, no children there. Some were told to work and the others, they went to the gas chamber.

Q There were no old people there, correct, old Jewish people?

A Yes, they were there.

Q And what happened to the old Jewish people who were brought to Treblinka?

A I really don't know if they were picked for work. They went to work. Other than that, they went to the gas chamber.

Q Is it your testimony that if old Jewish prisoners arrived in the transports, they, on occasion, were put to work?

A The Germans picked the strong ones, or I don't really know how the Germans picked them. I really wasn't there.

* * * * *

[1461] Q What were the baths? You mentioned the baths. What were they?

A This was a place where they told the Jewish people to go wash up.

Q To wash up?

THE INTERPRETER: To take a bath. I went to direct translation. It means to take a bath.

Q Did you know that these people actually were being put to death?

A Yes, everyone knew this through talks.

Q You've testified on several occasions that you were not inside the camp number two. Is that still your testimony?

THE INTERPRETER: Could you repeat that, please?

Q Is it still your testimony that you were not personally inside camp number two where the gas chambers were?

A Yes, I was never in the second camp, inside of the second camp.

Q Mr. Fedorenko, when you were interviewed by Mr. Pecevich, didn't you give the following testimony under oath. Why don't I read it and you can read it to him?

MR. POMEROY: What page?

* * * * *

[1465] Q Were you aware that thousands of Jews were being exterminated at Treblinka?

A Yes, I knew of this but how many I didn't know.

Q Government's Exhibit 13, page 4, do you recall telling Mr. Pecevich: "Were you aware of the fact that thousands of Jews were being exterminated in Treblinka?

"Answer: Yes, I knew" ?

A Yes, right now, I am saying that I knew. But how many, I don't know.

THE INTERPRETER: Do you understand? Kind of in other words he knew they were putting them to death—

MR. SALE: Yes, I understand, I just want his testimony from the stand.

THE INTERPRETER: Okay.

* * * * *

[1489] BY MR. SALE:

Q Mr. Fedorenko, I am going to show you at this time, Plaintiff's Exhibit 17, and ask you if photograph number 17 is a photograph of you?

A Yes. That's mine.

Q Now, I am showing you photograph number 16. Do you recognize the man in that photograph?

A No. Never saw him.

Q The Ukrainian whose name was Ivan who you said was at Treblinka, have you seen that Ivan at any time since you left Treblinka?

A No, I never saw him again.

Q Have you ever spoken to him at any time since you left Treblinka?

A No, I never talked to him.

Q Now, you testified on direct examination that the uniform you wore at Treblinka had one stripe on it, is that correct?

A Yes.

Q Isn't it a fact that the uniform you wore at Treblinka had two silver stripes?

A In Treblinka, they only gave me one, the other one, I don't remember whether they gave me [1490] in Travnicki or Lublin.

Q You were in Travnicki and Lublin before Treblinka, weren't you?

A Yes.

[1491] Q Do you recall in your deposition being asked about the number of stripes in your uniform in these questions and answers? Starting at the bottom of page 34:

> "Q While you were at Treblinka, were you given any insignias for your uniform?
>
> "A They were epaulets and there was one cross on the epaulets, striped, I think."

THE INTERPRETER: How many stripes?
MR. SALE: Striped, s-t-r-i-p-e-d.

Let me go on, please. I want to continue reading:

"Q Was it crossbones?" is the question.
"A One stripe, like silver; two stripes, silver colored.
"Q Two silver stripes?
"A Yes."

Do you remember giving that sworn testimony in your deposition?

A Yes, I remember this.

Q So now, do you remember that you had two silver stripes when you were at Treblinka?

A Yes. I remember one was thin, one was wider than the other.

Q So earlier, you said you had one stripe, [1492] now you're changing it to two stripes?

MR. POMEROY: I object, Your Honor. I don't think that was his testimony.

MR. SALE: On direct examination, he clearly said one.

MR. POMEROY: Your Honor, just before this line of questioning, he stated that he was given one stripe at Travnicki.

THE COURT: If he's changing it, his saying so won't make it so. His saying he's changing it won't alter that fact either. The question is a nonproductive question. Sustained.

[1493] BY MR. SALE:

Q In the Spring at Treblinka, were you given boots?

A Yes. Spring? I don't really remember when, but they gave me.

Q Weren't the two stripes that you had at Treblinka the same type of two stripes that the volksdeutsch wore when they supervised you in Lublin?

A Lublin or Travnicki, two or three they had. I really don't remember.

Q Those volksdeutsch who had two or three stripes supervised you, didn't they?

A Yes.

Q And now at Treblinka you had two stripes; right?

A I didn't have a full two stripes. I had like one and a half, if you want to count right.

Q Was there a difference, was the weather significantly different at Treblinka from the summertime to the wintertime? Much colder and much warmer in the different seasons?

A Just like here in the United States.

Q Didn't the Germans give you different uniforms to wear in the different weather?

[1494] A There was just overcoats in cold weather, that's all.

Q Did you testify on direct examination that at Treblinka those guards, Ukrainian guards, who did not have stripes walked around dirty, partied a lot and were drunk?

A That's correct. I can't say really not dirty, but those were the ones that weren't well disciplined, the ones that were drunk all the time, and were constantly drinking.

Q Prisoners of war, Ukrainian prisoners of war, were permitted to party and be drunk at Treblinka?

A The Germans didn't allow this a lot, but these people, they didn't listen to Germans and they just did it themselves when the Germans didn't see.

Q But you listened to the Germans, didn't you?

A Yes. I was aware of that I would be punished severely, I would be hit and then I really didn't like to drink anyway.

Q Were you a prisoner of war at Treblinka or a German soldier?

[1495] A How can you say I was a German soldier? They brought us there like they did the Jewish people.

Q Were you a prisoner of war at Treblinka or a soldier? That's the question.

A I felt like a prisoner of war.

Q Didn't you testify on direct examination, "I had a stripe; that meant I was a good soldier" ?

A Yes, I was a good worker and I always listened to what had to be done.

Q Didn't you also testify on direct that, "I was well disciplined and that I served well" ?

A Yes, I said this. And I said that if I didn't do what they were going to tell me, that I would be punished for this.

Q Would you say that you got your stripes, or as you call it, your stripe and a half, because you were efficient?

A Rohoza, at the time, told me to give my epaulet to him and that he was putting on one stripe for me there; and yes, it was because I was—because I was a disciplined person there. I did do what they told me there.

[1496] Q By being a disciplined person and doing what they told you, did that mean you followed the German orders efficiently?

A Yes, through Rohoza I had to do what I was told.

Q Whatever you were told?

A Stand on my post, don't allow anyone through.

Q You testified on direct that fifteen or twenty Ukranian guards left Treblinka, isn't that right?

A Yes, that's correct.

Q Didn't most of them never return?

A Majority didn't come back.

* * * * *

[1507] Q Shortly before coming to Danzig when the Kommandent at Treblinka ordered you to shoot at Jewish prisoners, you did so, didn't you?

A Yes. The Jewish people were firing and I was firing. It was like the Front.

[1508] Q Like the Front in which you were firing at the Jewish people; correct—the Jewish civilians; correct?

A They weren't civilians. They were armed. You had to protect yourself.

Q You never tried to escape from Danzig, did you?

A All the time we thought of this, but there's no place to go.

Q Thought about it, but you never tried to escape, did you?

A When you run away, you have to go into the woods, you have to look for the partisans and the par-

tisans might come down that there was an order to be shot, so they might have to shoot you. So that's why I never ran away.

Q Was it in the spring of 1945 that you were transported to Hamburg?

A Correct.

Q By the spring of 1945, when you were in Hamburg, wasn't it obvious to everybody that the Germans were losing the war?

MR. POMEROY: Your Honor, I am going to object. I don't see how he can answer as to [1509] what was obvious to everyone.

THE COURT: Sustained.

BY MR. SALE:

Q Mr. Fedorenko, did you know in the spring of 1945 that the Germans were losing the war?

A Yes, everyone knew.

Q When you knew the Germans were losing the war, didn't you then throw away the uniform, the black uniform, that the Germans had given you?

A Yes. We saw some Germans leaving and we already threw away this irritating uniform.

Q It became irritating now that the Germans were losing, is that right?

A Yes. The Germans were gone way, the Allies were moving up, and earlier than this, it couldn't be done.

Q Was the uniform irritating when you shot at Jewish prisoners at the uprising at Treblinka?

A It's only during the uprising the only time we ever shot at the prisoners. Other than this, we never shot prisoners.

* * * * *

[1518] THE COURT: Proceed, please.

MR. SALE: Yes, Your Honor.

BY MR. SALE:

Q Mr. Fedorenko, I was asking you about your statement to the representative of the Displaced Persons Commission. Now I am going to ask you, referring to Plaintiff's Exhibit 2 in evidence, I am going to ask you about

some things that you said and ask you whether or not they are true.

Did you attend elementary school from 1915 to 1918?

A That's correct.

Q But it was not in Sarny, Poland, was it?

A No.

Q From 1937, you were not a farmer on your own farm at Sarny, Poland, were you?

THE INTERPRETER: Where?

Q Sarny, Poland.

A Correct.

Q In 1942, you were not deported to Germany and employed as a worker by a factory, were you?

THE INTERPRETER: That was where? [1519] Would you repeat the question, please?

MR. SALE: Yes, I will. I will do it slowly.

BY MR. SALE:

Q It is not true, is it, that in March of 1942, you were deported to Germany and employed forcibly as a worker by a factory at Pelez near Stettin until the capitulation in May, 1945?

THE INTERPRETER: I don't know what capitulation means.

Q Until the surrender.

A No, that's right. I didn't work in a factory.

Q Those were the years you were in Lublin, Travnicki, and Treblinka as an armed guard, weren't they?

A Yes.

Q And it's not true, is it, that in May, 1945, you fled from Pelez to Hamburg, Germany?

A From Pelez they took us to Hamburg.

Q That's right. The Germans took you, didn't they?

A Yes.

Q You didn't flee to Hamburg?

[1520] A No.

Q Now this information that you gave to the Displaced Persons Commission, nobody threatened you or forced you to give this information, did they?

A Yes, I gave this information willingly. I gave this information like this because I didn't want to return to the Soviet Union.

Q I am showing you Plaintiff's Exhibit 3 and ask you if that is your signature?

THE WITNESS: Yes.

A Yes.

Q And you swore to the truth of this statement before the Vice Consul, didn't you?

A They told me what to do and that's the way I did it.

Q Like when the Germans told you what to do?

A Just like the Germans told me when I had to go stand guard.

Q You swore that your nationality was Polish. That's not true, is it?

THE WITNESS: No.

A My nationality, my name I never changed. I just said that I was from Poland.

[1521] Q And you are not from Poland?

A No, I am not from Poland but I said this so that I wouldn't return to the Soviet Union.

Q You also said from 1942-1945 that you were at Pelez, Germany?

A Yes, Pelez in Germany.

Q You swore before the Vice Consul that between 1942 and 1945 you were at Pelez, Germany.

THE COURT: Belez?

MR. SALE: P-E-L-E-Z, Your Honor.

THE COURT: B?

MR. SALE: P-E-L-E-Z, as in zebra.

A These papers were already prepared for the consul and they were already filled out.

Q You were not in Pelez, Germany during the years 1942 to 1945, were you?

A I was, but in '44.

[1522] Q But, in '42 and '43, you were in Travnicki, Lublin and Treblinka, weren't you?

A Yes.

Q You didn't tell the vice consul you were an armed guard at Travnicki, Lublin or Treblinka, did you?

A I don't even think the consul asked me this.

Q Do you recall, in 1969, filling out an application to file your petition for naturalization?

A Yes, I remember.

Q Was this filed out by your friend, Mr. Demjanink?

THE WITNESS: Yes.

A Yes.

Q Mr. Demjanink wrote down what you told him, didn't he?

A Yes, I think so.

* * * *

[1546] THE COURT: At Treblinka, did all of the Germans carry pistols?

A I think so, all.

THE COURT: Did all the volksdeutsch carry pistols?

A Yes. I would like to also add that few Germans also had rifles.

THE COURT: Did the Germans get permission for the Soviet guards to carry pistols?

A The Germans gave the order that we could carry pistols.

THE COURT: At the time of the uprising, did you shoot over the heads of the escaping prisoners, or at them?

A I didn't aim at anyone. I didn't shoot anyone, I was just shooting because we had to shoot. It was a long distance away, and I think the people that were laying next to me were doing the same.

* * * * *

[1564] Q Going back to the uprising, after Treblinka, on direct examination, didn't you testify you shot at the prisoners? On cross examination, didn't you testify you shot at the prisoners?

A Yes.

Q But didn't you tell the Judge that you shot over their heads?

A Shot? I had to shoot. How can you—

Q When you answered the Judge's question, weren't your exact words "It was too far away to be able to aim" ?

A That is true, it was too far.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FEODOR FEDORENKO, DEFENDANT

OPINION—Filed July 25, 1978

The Government seeks to strip defendant of his American citizenship granted in 1970. Basically the Government charges that defendant lied on his application for a visa in 1949, particularly in not disclosing he served as a guard at the death camp at Treblinka during World War II. Further, the Government charges he participated in atrocities at Treblinka, precluding him from having the good moral character necessary to become an American citizen. Defendant, originally a Ukrainian, contends that he was not a guard voluntarily but he was forced to be one as a prisoner of war of Nazi Germany and denies committing any atrocities at Treblinka or elsewhere.[1]

DEFENDANT'S CONDUCT IN AMERICA

Defendant Fedorenko came to America in 1949 and has been a respectable resident ever since. Following his arrival he worked on a farm in Connecticut. After a year he worked in a factory in Waterbury and then went to work for Scovill, a manufacturer of brass and copper products; he worked there, usually as a foundry worker, for 20 years until his retirement. He was emphatically described by fellow-workers at Scovill as an

[1] This memorandum opinion contains the court's findings of fact and conclusions of law in compliance with Rule 52, F.R.C.P. In addition, the court has included considerable detail about the evidence bcause of the extensive review of evidence afforded to the Supreme Court and Court of Appeals in denaturalization cases. U.S. v. Nowak, 356 U.S. 660, 78 S.Ct. 995 (1958) and others. Further, the court has added observations to give the flavor of the trial as well.

"excellent" worker who did not speak unkindly of anyone; that he was so good a worker he had no problems and was a "real gentleman" with no apparent prejudices of any type. The union representative at Scovill testified strongly as to his reliability and performance—a man who never put in a grievance and never had one filed against him. His foreman described defendant as a man who did his job well and cheerfully—a very conscientious and a very good worker.[2] The court accepts these appraisals as accurately reflecting defendant's work-life and personal life for 29 years.

The defendant married while in America but his American wife has died. For background: until the early 1960's defendant believed his wife and two children in Russia had been killed during World War II. He had been so advised at a prisoner of war camp by two brothers from his home town. He has since discovered his wife and sons are alive and living in Crimea; he has visited them in the 1970's. His only schooling was in his native Ukraine for three years from the years 1915 to 1918, during the defeat and collapse of Czarist Russia.

Defendant has retired on a social security pension and a pension from his 20 years labor at Scoville. He doesn't own a car; he doesn't own a house; he owns no real estate except a cemetery lot, and he has a burial insurance policy. He has accumulated a life savings of $5,000 but owes his attorney an unknown fee for a trial which lasted 14 days. He has never been arrested in 29 years—not even for a traffic offense. His one failure as a resident and citizen in 29 years: he received one parking ticket. Feodor Fedorenko has been a hard-working and responsible American citizen.

VENUE AND PRELIMINARY MATTERS

This suit was instituted in August, 1977 while defendant was a resident in Miami Beach, pursuant to the requirement of 8 U.S.C. § 1451(a) that suit be filed "in

[2] The only reference to World War II by defendant any fellow-worker remembers was when he cried about the loss of his wife and sons.

the district in which defendant resides." Defendant challenged venue on the grounds that his presence in Miami Beach, where he was then living, was only temporary and that his permanent residence was in Waterbury, Connecticut. The court denied defendant's motion to transfer, holding that venue properly lay in the Southern District of Florida.[3]

However, in an effort to alleviate defendant's claim of financial hardship in producing witnesses in Florida the court—through the gracious hospitality of the United States District Court for the District of Connecticut—held a portion of the trial in Waterbury.[4] Although the hearing in Connecticut was originally scheduled to follow presentation of the Government's case in Fort Lauderdale in April, the Government's case was postponed until late May and June because of a recent appearance by Florida defense counsel.[5]

Consequently, part of defendant's case was heard out of turn prior to the presentation of the Government's case in Fort Lauderdale without objection by either side. Two government witnesses also testified in Waterbury without objection, as a convenience to the witnesses.

A second problem developed prior to trial with regard to the Government's obtaining testimony of foreign witnesses. Early in November 1977, the court learned of the Government's intention to take depositions out of the country. Because it was concerned that the Government might intend to produce only deposition testimony of

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[3] Although the Government produced only minimal proof to justify denial of the motion, defendant admitted at trial that he was a resident of Miami Beach from August 1976 to September 1977 after suit was filed.

[4] The court appointed itself a special master under Rule 53 F.R.C.P. for the purpose of holding a hearing and receiving evidence in Waterbury. The parties stipulated that the evidence be received without the necessity of filing the report and further that it could be considered as if it had been presented at trial.

[5] Defendant's initial counsel, Brian Gildea of New Haven, was permitted to withdraw after Gregg Pomeroy of Fort Lauderdale filed his appearance. However, Mr. Gildea assisted at the hearing in Connecticut.

foreign witnesses, the court *sua sponte* entered an order prohibiting the use of deposition testimony at trial in order to enable the court to observe the witnesses' faces, body language and reactions in the courtroom, particulary in the presence of defendant and also his reactions to their testimony. The court felt that in-court testimony would be particularly critical in view of possible identification problems and the passage of 35 years since the events complained of at Treblinka. In addition, depositions taken by the Government in Israel almost surely would not have provided cross-examination. In compliance with the court's order the Government was compelled to bring its witnesses from Israel to Fort Lauderdale.[6]

CHARGES AND DEFENSES

Title 8 U.S.C. § 1451(a) provides that for good cause shown the United States Attorney shall institute proceedings to set aside an order admitting a person to citizenship and cancel the certificate of naturalization on the grounds that such order and certificate were "illegally procured or were procured by concealment of a

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[6] The court in its order suggested that if the Justice Department wished to bear the expense of defendant and his counsel, and the court's as well, to hear testimony of the Israeli witnesses at some neutral site such as Athens or Istanbul, the court would be willing to do so as a Special Master. The Justice Department declined but the court has since been informed by Government counsel at the pretrial conference that it would have been more economical for them to have done so inasmuch as they brought ten witnesses from Israel for the purposes of trial and most insisted on bringing their spouses as a condition of testifying.

Subsequent to the court's order regarding witnesses' testimony, the Judicial Conference of the United States passed a resolution at the March 1978 meeting prohibiting United States Courts from holding court outside the United States. In view of the expense problem of the Israeli witnesses, as well as the much more critical problem of obtaining testimony of the Russian witnesses discussed subsequently in this opinion, this court must respectfully suggest that special circumstances might justify authorization for a United States District Court to hold evidentiary hearings outside the United States for trial purposes.

material fact or by willful misrepresentation" and concealment as grounds for denaturalization.

In Count 1 the Government charges that defendant gave false information in his application for Immigration Visa and Alien Registration, and that his citizenship was therefore "illegally procured" because he was never lawfully admitted to the United States.

Counts 2 and 3 allege that defendant was not admissible to the United States under the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, nor was he otherwise admissible under the Immigrations Laws and Orders and Regulations issued thereunder because he participated in the commission of crimes and atrocities against civilians in the Treblinka concentration camp during 1942-43.

Count 4 alleges that defendant willfully failed to disclose the commission of crimes at Treblinka in response to question # 6 on his Application to File Petition for Naturalization (Form N-400).

In Count 5 the Government charges that defendant willfully failed to disclose his services as an armed guard for the Germans in response to question # 7 on the N-400 form.

Finally, Counts 6 and 7 allege that defendant lacked the good moral character required to become a citizen by virtue of his commission of atrocities at Treblinka and the giving of false statements with request to questions # 6 and # 7 as alleged in Counts 4 and 5.

DEFENSES

Defendant Fedorenko in his answer raised the special defenses of waiver and estoppel, improper venue, and the statute of limitations. Primarily defendant contended that the long passage of time between the incidents at issue and the institution of this law suit served to bar the Government from proceeding. The defense of improper venue was based on the allegation that defendant did not reside in Florida at the commencement of this law suit.

At trial, defendant virtually abandoned these special defenses; instead he denied generally having committed

atrocities or crimes against humanity while a prison guard at Treblinka. Also, defendant sought to establish that his service as a guard at Treblinka and elsewhere was performed involuntarily while he was himself a prisoner of war.

BURDEN OF PROOF

Because of the importance of a loss of citizenship to the individual, a denaturalization proceeding is a most sensitive trial.

Thus, the burden of proof in denaturalization cases has been clearly stated by the Supreme Court in *Nowak* v. *United States*, 356 U.S. 660, 663, 78 S.Ct. 955, 957 (1958), as follows:

> Where citizenship is at stake the Government carries the heavy burden of proving its case by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' * * *." *Schneiderman* v. *United States*, 320 U.S. 118, 158, 63 S.Ct. 1333, 1352, 87 L.Ed. 1796. "Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness." *Id.*, 320 U.S. at pages 122-123, 63 S.Ct. at page 1335.

As the Supreme Court has stated:

> [Denaturalization cases] are extremely serious problems. They involve not only fundamental principles of our political system designed for the protection of minorities and majorities alike. They also involve tremendously high stakes for the individual. For denaturalization, like deportation, may result in the loss "of all that makes life worth living." (citation omitted) *Knauer* v. *United States*, 328 U.S. 654, 659, 66 S.Ct. 1304, 1307 (1947).

PUBLISHED POLICY CONCERNING DENATURALIZATION CASES

A failure to follow the published policy of the Department of Justice does not bar the bringing of the suit.

United States v. *Nelligan*, 573 F.2d 251 (5th Cir. 1978). However, it is interesting to observe the policy of the Department of Justice with respect to bringing denaturalization cases:

> "In the opinion of the department, as a general rule, a good cause is not shown for the institution of proceedings to cancel certificates of naturalization alleged to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country.[7]

The court cannot help but question the application of this policy towards defendant in view of his 29 years of lawful conduct—except for one parking ticket—and hard work here in America.

The court observed at the trial and iterates it here: never in six years on the bench has the court seen the Government indulge in such expenses as daily copy of the reporter's transcript of testimony or having four lawyers at the Government's counsel table.[8] Such ex-

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[7] The statement of policy continues, as follows:

> The legislation referred to, being retroactive,[21] is construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individuals concerned. Ordinarily, nothing less than the betterment of the citizenship of the country should be regarded as sufficient to justify the disturbance of personal and property rights which cancellation proceedings may occasion. This does not mean that such proceedings should not be instituted in any case where willful and deliberate fraud appears, as the perpetration of such fraud would indicate lack of the moral qualifications necessary for citizenship. If, however, many years have elapsed since the judgment of naturalization was apparently so procured, and the party has since conducted himself as a good citizen and possesses the necessary qualifications for citizenship, cancellation proceedings should not, as a rule, be instituted." Dept. of Justice Circular Letter No. 107 (Sept. 20, 1909), reprinted in Immigration and Naturalization Service Handbook at 6508, 08.1.

[8] In addition, the Government which bears the expense of translators, hired two Russian translators for defendant's testimony.

[Footnote continued on page 62]

penditures of the taxpayers' treasure and talent have not occurred in this court's previous cases such as the prosecution of an alleged Mafia don, a continuing criminal enterprise case, the only dangerous special offender indictment in this district for the reputed salaried slayer for a narcotics importation gang which was responsible for at least 26 murders in the South Florida area according to the testimony in the District Court in Miami, as well as many other serious prosecutions. Clearly the expenditure of the resources of the Executive Branch lies within the discretion of that branch of the Government. However, the court must venture that in view of the similarity in the burden of proof between criminal cases and denaturalization cases, and in view of what is at stake for the naturalized American citizen, the defendant in a denaturalization case ought to have the same resources that are provided a defendant in a criminal case under the Criminal Justice Act; in short the naturalized citizen—provided the defendant's financial condition warrants it—should receive the benefit of court-appointed counsel and other experts at the Government's expense.

One more observation needs to be made before moving to a consideration of the evidence. If ever a case supported the Judicial Conference rule barring cameras from the courtroom, this case does. From the beginning it was like a Hollywood spectacular and polarized the residents of South Florida.

As an example of some of the emotional intensity surrounding the trial, the Jewish Defense League ran ads in newspapers offering chartered buses from Miami Beach to Fort Lauderdale on opening day. A demonstration outside the courtroom ensued with a chant: "Who do we want? Fedorenko. How do we want him? Dead." After the court was interrupted twice and the

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[8] [Continued]

The extra one sat behind Government counsel's table—another first.

The Government neither provided a copy of the daily transcript to defendant nor did it offer to provide a "back-up" translator when the Israeli witnesses testified.

first three warnings were ignored by the demonstrators, a leader who was using an amplified bullhorn was arrested. A counter-demonstrator appeared two days later with an ensuing confrontation. Lamentably, defendant's counsel was briefly attacked by women spectators at the courtroom entrance at the close of the trial. If the trial had been brought into South Florida homes by television, the incidence of such confrontations likely would have increased.[9]

EVIDENCE AS TO DEFENDANT'S CONDUCT, 1941-1949 PRE-TREBLINKA [10]

Defendant was mobilized on June 23, 1941, almost immediately after the invasion of the Soviet Union by Nazi Germany. He was a truck driver and the truck he drove was also mobilized. He had no previous military training and in the next two to three weeks his group was encircled twice by the German Army. He escaped the first time but was captured three days later by the Germans with about one-third of his fellow Russian soldiers.

The Germans transported several truckloads of prisoners to Zytomir, a former Soviet training camp, and defendant described the conditions as very bad and with little water or food; the camp housed about 50,000 to 100,000 prisoners, with no barracks available for them. After two to three weeks he was then transferred to Rovno for about 10 days where there were fewer people than at Zytomir; the camp was surrounded by electrified barbed wire.

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[9] Fortunately, the U.S. Marshal Service and the Fort Lauderdale Police Department performed at their outstanding level of competence in maintaining courtroom decorum and order in the environs around the court facility. The deputy marshals even apprehended one news reporter going through the judge's wastebasket under the bench.

The court is unaware if the Government is bringing charges against the demonstrators under 18 U.S.C. § 1507.

[10] The only evidence as to defendant's activities before Treblinka was given by defendant plus some opinions voiced by Government's expert Jenkins.

Next he was transferred to Chelm, Poland, a camp also ringed by barbed wire rolls. The prisoners who tried to escape were trapped on the barbed wire and their plight was quite visible to fellow-prisoners in the morning. While at Chelm he worked in the kitchen, dug holes and built barracks. Defendant estimated the population at Chelm at about 80,000 prisoners.

Defendant described the conditions at Chelm as so bad that if you became ill you rarely recovered. He also indicated that food was at a minimum and that approximately 40,000 prisoners of war died over the winter of 1941-1942. Defendant testified that he supplemented his food intake by eating grass and roots.[11]

Defendant testified he would receive beatings from German soldiers when he didn't understand and comply with orders. On two occasions he was hit with a rifle butt, once when he went to pick up a beet and also when he picked up an apple a Polish citizen had thrown. Defendant testified the conditions at Chelm were so bad that he would have died if he had not been transferred to Travnicki.

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[11] The court can take judicial notice from numerous news stories published during the trial that many spectators at the trial had been in various concentration camps or death camps in Europe or had lost relatives there, or both.

Defendant's testimony on direct began shortly after lunch. During the lunch recess a memorial service for the dead at Treblinka was held in the park-like area immediately outside of the courtroom. (The United States courtroom in Fort Lauderdale is in temporary quarters and the splended new facilities for the Fort Lauderdale court and Federal Building will not open until about three months hence). Judging from the spectators' reactions to the colloquy over translating problems at the beginning of defendant's testimony, the spectators were hardly receptive to defendant; but that was to be expected as he had been described over the period of two weeks by various witnesses as committing gross atrocities.

Defendant described his early personal life; when he revealed his loss at the age of eight of his father in World War I and that his father was killed "by the Germans, of course", the courtroom became immediately quiet as if an engineer in the sound control booth had turned the gain control knob down to zero. When defendant testified about surviving by eating roots and grass, the courtroom became even quieter although that didn't seem possible.

One day at Chelm the Germans assembled the Russian prisoners and walked down the line selecting 200 to 300 who were sent on to Travnicki. Defendant vehemently denies volunteering and described the selection process: "they (the Germans) didn't ask; if you didn't go they'd shoot you down like a dog."

The court specifically finds that the defendant did not volunteer for transfer to Travnicki.

At Travnicki most of the guards were Volksdeutschers (ethnic Germans who resided outside Germany in the areas occupied by the German Army). Defendant is not a Volksdeutscher but Ukrainian. He was doing carpentry work at Travnicki and testified he had to work or he might be executed. He received several beatings from the guards. Just as defendant was a hard-worker in America, he clearly did not shirk work responsibility at Travnicki—undoubtedly why the Germans selected him. He indicated that sometimes a loaf of bread was given for working.

In the spring of 1942 the Germans gave black uniforms to all of the prisoners. Volksdeutschers also were black uniforms but theirs were well-tailored and of better material. After the barracks had been constructed at Travnicki the Germans gave instruction in the firing of rifles, such as field-stripping and in marching. They were not allowed to fire a rifle or to keep one. They also received some privileges such as being able to walk down the road outside of the camp. Defendant testified that he went to a Polish home where he gave them soap and they fed him. He added that if a prisoner did not come back he would be executed (when located).

In the spring of 1942 defendant was sent to Lublin where at first the prisoners guarded their own camp and then were sent to the Jewish ghetto; again the Germans did not ask for volunteers but demanded them to go. At Lublin the Soviet prisoners guarded houses, furniture—whatever was left; they were issued rifles which were not fired. The Soviet prisoners were converted from workers to guards at Lublin.

From Lublin defendant was sent to Warsaw along with about 80 to 100 others and the Soviet prisoners

were asked if they wanted to go but none volunteered: there was "no choice." They were transported with a few Germans and two or three zugwachmaenner (spelled Zugwachmänner in German).

Defendant was transported to Treblinka as a prisoner-guard in approximately September 1942.

TREBLINKA

The Government called six survivors at Treblinka, four of whom served as working prisoners at Camp 1 and two in what was described as Camp 2 (where the gas chambers were located.)[12] Each of the Government

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[12] Inasmuch as the actual operation of Treblinka is not an issue, it will be described in footnote form to assist in evaluating evidence of what defendant actually did there.

Because of the nature of the Government's charge and also the nature of Fedorenko's defense, evidence was presented in clinical and gruesome details about the operation of the death camp known as Treblinka. The testimony was so gruesome that on more than one occasion the court doubted it would be possible to continue taking evidence until the usual recess time. Early recesses were required for the witnesses on several occasions.

Treblinka was a human abattoir. It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead before nightfall. It was operated with a barbarous methodology—brutally efficient—and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization.

The camp at Treblinka was described repeatedly by witnesses with details to shock any listener. The camp was garrisoned by approximately 30 members of the SS and 150 Soviet, mostly Ukrainian, guards. Also in the camp were approximately 700 Jewish prisoners, mostly men, who performed various tasks.

The Government witnesses were among the working prisoners who escaped during an uprising on August 2, 1943. Each had been there from eight to ten months as a laborer.

The general methodology emerges from the evidence: the Jewish victims were either rounded up from ghettos in Poland by the SS and Russian, Ukrainian or Latvian guards or were lured into a square by handbills promising each person three kilos of bread and a quantity of jam. One witness, Josef Czarny, then 15, came to the square in response to the notice after his parents and three sisters had starved to death in the Warsaw ghetto. After sometimes being held for as long as three days, they were then herded,

witnesses testified as to general or specific instances of murder or brutality on the part of defendant.

Defendant admits he was a guard at Treblinka; however, he claims that he was a guard involuntarily and

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with beatings, into cattle cars on a train. The train trip took occasionally three days, although Treblinka was located only about 100 kilometers east of Warsaw. No food or water was permitted the prisoners on the train and some slaked their thirst with perspiration and urine. Several persons perished during the trip and approximately 100 persons would be in the cattle cars or box cars.

Sometimes four or five trains (transports) would arrive at Treblinka during a day but occasionally there would be none. Each transport would contain 2,000 to 3,000 prisoners. The prisoners, unless selected as a labor prisoner, would be exterminated that same day either in a lazaret or the gas chambers.

Apparently to maintain order the prisoners aboard the train were told they were going to a labor camp although at least one witness testified of knowing what Treblinka was. He also testified he could smell the burning flesh upon arriving there. However, various ruses confronted the prisoners as they were ordered from the trains onto the ramp between two rows of SS troops and Soviet guards urging them to run faster and beating them with whips and rifle butts. The ruses included a sign over the camp entrance in German bearing a motto that "work makes life sweeter" and an orchestra playing at the entrance. The orchestra was conducted by Herbert Gold (a noted conductor from Warsaw, per *Fort Lauderdale News* article dated June 3rd, 1978). Mr. Gold and the members of the orchestra were, of course, working prisoners. A well was nearby but it was dry.

In view of the relatively small number of SS and Soviet guards, even though well armed, compared to the large number of labor prisoners and arriving prisoners, the system of ruses, beatings, and humiliation apparently was to assist the SS in maintaining order by keeping the arriving prisoners confused and bewildered and thereby docile. In addition, it also prevented organization among the prisoners which might have resulted in a charge en masse by the prisoners. Only the prisoners arriving after the ghetto uprising in Warsaw in the spring of 1943, for example, refused to doff their clothing upon their arrival.

A grisly establishment was camouflaged and identified as a lazaret, meaning first aid station. The working prisoners were also at the entrance of the lazaret bearing Red Cross armbands and a Red Cross flag flew over the entrance. Another cruel ruse: it was a charnel house.

The purpose of the lazaret was to receive and liquidate the aged, the crippled and children without parents. These persons were separated from the rest of the arriving prisoners and taken

denied emphatically that he committed any atrocities or any of the specific acts of brutality described by the witnesses.

It is important to bear in mind that no documentary evidence whatsoever was introduced by the Government or defendant as to the duties or conduct of defendant at Treblinka. Therefore the issue turns entirely on the testimony and credibility of the witnesses.

The first witness, Eugen Turowski, testified that he had seen defendant at the lazaret many times shooting prisoners. He testified that defendant carried a leather whip with metal balls on it and frequently saw him beating arriving prisoners. He also claimed defendant shot prisoners who, after escaping and then being recaptured, were hung upside down as an example to the other prisoners. Turowski described defendant in 1942 as having specific eyes that were "slightly Chinese looking" and that defendant was a non-commissioned officer who spoke "bad German" and was called by name by

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to the lazaret which had a bench on the bank of a pit three meters deep and approximately 20 meters long and 10 meters across. After being stripped the prisoners were seated on the bench and were executed by being shot in the back of the head; their bodies would fall into the pit. A fire was kept constantly burning in the pit to dispose of the corpses.

The other arriving prisoners were separated into groups of men and women; the men were ordered to remove all their clothing in the open "square". The clothing was processed by the working prisoners and the camp was described as having "mountains of shoes" and "mountains of eye glasses".

The female prisoners were herded into a barracks where they were ordered to disrobe; they then filed into a barber shop set up at the end of the barracks where 20 men served as barbers. Each barber had about one minute to cut as much hair as possible from the head of each woman. Apparently the hair was used for various products as well as being steam cleaned in an effort to find if any valuables were hidden there. From the barber shop the women were herded out onto the path and both men and women made to run to Camp 2 where the gas chambers were located, referred to as "baths".

As final sardonic actions, the path to Camp 2 was termed by the SS "himmelweg"—the road to heaven. And on the gas chambers in Camp 2 was painted the Star of David.

Treblinka—bleaker than Bruegel's *Triumph of Death*. The death toll? One million victims, according to one witness.

the SS personnel. Turowski claimed there were no Volksdeutschers at Treblinka but that Biedermann was the leader of the "Ukrainian" guards and that Rohoza was not a leader of an Ukrainian unit.

The second witness, Schalom Kohn, testified that defendant beat him with his whip on two occasions and he saw defendant beat other Jewish prisoners at the arrival of the transport. He also testified he saw defendant beating prisoners at the lazaret.

Kohn described defendant as "mean-looking", and when he walked around the courtroom there was the same "mean-looking" face; that was his explanation for being able to identify defendant in the courtroom.

Josef Czarny, clearly the least credible of the survivor witness, testified that at the arrival of every transport he saw defendant beating people as they emerged from the cars, and that he saw defendant on one occasion shoot a prisoner at the lazaret. Czarny claimed to have seen defendant at every one of the twice-daily assemblies, and that there were no other Ukrainians at the daily assemblies.

Mr. Gustaw Boraks was the last of the survivor witnesses who worked in Camp 1, the receiving area where the lazaret was located. He was the most candid and credible of the survivor witnesses. Boraks testified he would go to the arrival of the transport two or three times a week to look for friends or relatives and saw defendant there although he had only a few minutes to stay in that area. He never saw defendant hitting prisoners or had any personal confrontations with him.

From his position in the barber shop nearest the door at the end of the barracks where the women had to undress, he heard a shot one day. Boraks rushed to the door and saw defendant, the SS and other Soviet guards and a woman who had been shot in the shoulder. He did not see Fedorenko shoot her but testified that defendant had a revolver in his hand and was closer to the woman than anyone else. He subsequently cut the woman's hair before she was sent to the gas chamber; she told Boraks that she had been shot because she did not want to undress. He didn't know who shot the woman and the

woman said she didn't know who it was either. He further testified that defendant did nothing wrong in the barracks with the women who were undressing. He testified he had seen defendant chasing people on the pathway to Camp 2 a few times and he knew it was defendant because he wore a black uniform while the others wore khaki. He testified that Fedorenko was some type of leader of the Ukrainian guards.

Two witnesses testified about working in Camp 2, where the gas chambers were located. The first, Sonja Lewkowicz, testified that defendant had a long and terrifying face and that she saw him in Camp 2 many times. She testified that on one occasion she saw him from a distance of 20 meters shoot a Jewish prisoner in Camp 2, but when she realized what was happening quickly turned her head. She never remembers defendant being at the twice-daily assemblies and never remembers seeing him beat or mistreat any prisoners other than the shooting incident.

The last of the survivor witnesses, Pinchas Epstein, was a witness with considerable intensity showing on his face; he testified he saw defendant beat Jewish prisoners and that on one occasion defendant shot and killed a friend of his named Laibel from his home town. On direct examination he described the incident as having occurred when Laibel's partner was returning alone from dumping a corpse into one of the pits in Camp 2.

On cross-examination Epstein stated he was Laibel's stretcher-bearer partner on the day Laibel was shot. That answer was completely inconsistent with his testimony on direct; upon his realization of that he began to squirm and fidget in the witness stand. In addition, Epstein did not mention to investigator Martin Kolar the matter of the shooting of his home-town friend or of any of the beating incidents attributed by him to defendant despite a three hour conversation with Kolar. Epstein acknowledged that Kolar told him at the interview that the purpose of the interview was for testimony against Fedorenko.

Defendant's testimony was basically a denial of all charges. He contended he was a wachmann—a sentry or

guard—not a non-commissioned officer. He testified that he was never in the barracks with the woman undressed; he was only at the arrival of the transport on one or two occasions and did not know what was going on at the camp. At least the latter is not credible to this court, neither in content nor from the manner in which the testimony was given. Defendant was far from convincing in his manner of speaking and appearance when he testified about unawareness of what was going on at Treblinka. (That testimony was in distinct contrast to his usual earnest testimony where he often volunteered extra items in his answers.) He testified he patrolled the fence as a guard and served in the tower. He testified he only served as a sentry outside of Camp 2 one day and saw what was going on, and reported to his zugwachmann—whom he identified as Rohoza—that he couldn't eat or sleep and didn't want to go back to that post again. He denied participating at all in Camp 2 or ever being near the gas chambers.

The phrase most constantly used throughout the trial was zugwachmann. The survivors were all convinced and all testified that zugwachmaenner were leaders among the Ukrainian or Soviet guards and that defendant was one.[13] The word does not translate easily and despite the request of the court for any source of material providing a translation, none was offered. The survivor witnesses claimed that defendant was a zugwachmann because he had one or two stripes on his shoulder. Defendant explained the stripes away as being good conduct awards because he didn't walk around dirty or get drunk.

The Government offered no expert testimony on the rank-structure and testimony of their expert witness, Mr. Kempton Jenkins, didn't quite touch on the subject. His testimony about the camps was consistently inaccurate.[14]

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[13] Apparently, zugwachmann is the leader of a group of guards or sentries and the group is the size of a squad (could be as large as one-third of a company). See Heath's *German* Dictionary.

[14] For example, see text at page 36.

Defendant's description of who was a zugwachmann at least fits a logical pattern. He characterized zugwachmaenner as being Volksdeutschers because the Volksdeutschers', who were of ethnic German background, ability to speak both German and Russian or Ukrainian enabled the SS to use the Volksdeutschers as zugwachmaenner to transmit orders. From the evidence the chain of command in a descending order went as follows: SS (Schutzstaffeln); Volksdeutschers as zugwachmaenner; Soviet, basically Ukrainian, guards; working prisoners with a Nazi-imposed hierarchy of a head kapo, kapos, vorarbeiters (foremen), and regular working prisoners. There is nothing in the evidence to suggest that Fedorenko is a Volksdeutscher [15] and there is nothing in the record from his background or education to raise the slightest suspicion that he could have learned more than a few words of German.

Fedorenko's testimony that only Volksdeutschers qualified as zugwachmaenner is supported by the berthing and messing arrangements at Treblinka. The SS didn't let the Volksdeutschers sleep or eat in the same barracks with them. Instead, the Volksdeutschers were permitted to sleep in a separate barracks—apparently giving them some privileges because of their German background—

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[15] The court considered the possibility that defendant's mother was an ethnic German. The first (Christian) name, Anna, is not an infrequent one both among German and Russian names. Defendant consistently listed his mother's maiden name as Hubar. The court's very limited familarity with the German language doesn't cause any suspicion that the surname, Hubar, is a German name. However, on defendant's application for citizenship her name is spelled H-u-b-e-r; that spelling is in red ink and those notations were added by the Immigration and Naturalization Inspector Zimon. Notice can be taken of library resources which indicate that the name is a Ukrainian rather than German name; for example, O. Hubar has been cataloged by the Library of Congress as the author of a work on Urkainian literature.

Even if defendant's mother were an ethnic German, there is nothing to indicate that his father was an ethnic German. It seems highly doubtful—and speculative at most—to assume the German language was spoken in the Fedorenko home, at least before the father's death. Far more importantly, the evidence overwhelmingly rebuts any such speculation.

but were required to eat with the Soviet prisoner-guards, facilitating supervision of the guards by the zugwachmaenner.

The court specifically finds defendant was not a Volksdeutscher and not a zugwachmann.

PHOTO SPREADS

In view of defendant's assertion that he was only a perimeter guard who didn't commit any atrocities at Treblinka, the issue of identification is the heart of this case. The witnesses' identifications of defendant as the perpetrator of the crimes described were based on recognition of his photo and his person in the courtroom. In view of the passage of 35 years from the date of the incidents, the court must scrutinize these identifications and the circumstances under which they were made with great care.

The subject of pretrial and in-court identification and their reliability have received thorough attention by the courts in criminal cases. This attention has been focused on the dangers that pretrial identification may taint or make unreliable subsequent in-court identification. Thus to preserve the integrity and fairness of pretrial identification procedures, courts have imposed on their use certain requirements of due process. *See, e.g., Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972); *Stoval* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), *Foster* v. *California*, 394 U.S. 440, 89 S.Ct. 1127 (1969).

Although the instant case is a civil case, the concerns of the Supreme Court regarding the reliability and probative value of identifications made in criminal cases are no less applicable here. Thus the court turns to those cases to determine what weight to give the testimony in this case in view of the circumstances surrounding the witnesses' identifications.

The problems inherent in the use of photo spreads as a pretrial identification procedure were pointed out in *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967 (1968). In the usual case, where a witness has not had an opportunity to get a good look at a criminal under favorable

conditions, there is a danger of misidentification of a photograph, even under the best of circumstances. This danger is greatly increased when the photograph is placed in a photo spread in such a manner that the witnesses' attention is drawn to it because of its size, color placement or other distinguishing mark. Thus while the Court recognized that use of photo spreads was necessary in police work, it held that a conviction based on an in-court identification following a pretrial identification would not stand if the photo spread was so unduly suggestive as to foster "a very substantial likelihood of irreparable misidentification." 390 U.S. at 384, 88 S.Ct. at 971. Cases following *Simmons* have therefore followed a two-step formula in determining the admissibility of an in-court identification based on an out-of-court photo spread: ". . . (1) whether the procedures followed were 'impermissibly suggestive', and then (2) whether, being so, they created 'a substantial risk of misidentification' ". *United States* v. *Henderson*, 489 F.2d 802, (5th Cir. 1973).

With a time interval of 35 years, rather than days or a few weeks as in the typical criminal case, the threshold of what suggestibility becomes impermissible must necessarily be lowered. The court cannot find a decision considering the question with a time lag of many years' duration. The Supreme Court did observe in *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972) that a lapse of seven months between the event and the confrontation ". . . would be a seriously negative factor in most cases." *Id.* at 201; *Id.* at 383. In the instant case where there is a gap of almost 35 years between the event and the witnesses' ability to observe the suggestive photo spreads, the photo spread should have been as clinically impartial as humanly possible to construct.

Prior to giving testimony in this trial, each survivor-witness was interviewed in Israel by the Israeli police concerning events at Treblinka. Each was shown a group of photographs and asked if they recognized anyone.

The photo spread (Government's Exhibit 17) was prepared by Maria Radwiker, an Israeli attorney who worked as an inspector investigating Nazi crimes from January 1965 until her recent retirement in January of this year.

She showed only the first three pages of the photo spread to witnesses Turowski and Czarny and all six pages to Kohn. Mr. Boraks was shown only page 3 of the exhibit, Ms. Radwiker's successor, Martin Kolar, showed witness Lewkowicz pages 2 and 3 of the exhibit and only page 3 after a three hour interview to witness Espstein.

Only two of the photographs of the photo spread are claimed by Ms. Radwiker to be guards who were at Treblinka—#16 and #17. Page 3, which was shown by itself to several of the witnesses, contains 8 photographs, numbers 10 thru 17. Not only is each of the first six smaller than either #16 or #17 but each is also blurerd, shadowed or otherwise indistinct. By contrast, photographs #16 and #17 are both much larger than the other photographs and are the only clear ones. Not only is defendant's photograph larger than the others but it is also unnecessarily so: along each side is a superfluous black border approximately one-half inch in width. At the very minimum, it should have been trimmed to reduce the size of the picture.

A review of the first two pages reveals more blurred or otherwise indistinct photographs. The only one with any clarity is #9, and it is smaller and less clear than either #16 or #17.

All six of these witnesses escaped from Treblinka during the uprising on August 2, 1943. Several of the witnesses had trouble identifying defendant's photograph in the sense that it took one to five minutes to do so. For example, Boraks took one to two minutes to identify photograph #17 although he had looked at the same photo spread in an interview earlier that same day where the investigators were investigating #16; witness Epstein looked at the picture four to five minutes after a three-hour interview and identified the person as a zugwachmann but couldn't remember his name. Turowski testified that he immediately recognized the person in picture #16 (not Fedorenko). Ms. Radwiker indicated to him that #17 was Fedorenko and asked if he recognized Fedorenko; Turowski testified that after awhile he came to the conclusion he recognized him.

The Government only asked the first three of the witnesses to identify defendant in the courtroom, a subject which will be discussed in detail subsequently.

Kolar testified that in Israel the showing of three photographs is sufficient and Ms. Radwiker defended her manner of presentation of the photo spread as "my method."

Considering all circumstances surrounding the photo identifications, it seems clear that the makeup of the photo spread in this case is impermissibly suggestive. There was no reason at all for the Israeli investigators to set up the photo spread in the suggestive manner in which it was done. Perhaps the explanation given by Mr. Kolar that only three photographs are required in Israel provides the answer to why it was done in this fashion. However, the photo spread simply does not pass muster under American law.

The court must conclude not only was the photo spread impermissibly suggestive but it also led to a substantial act of misidentification for the three witnesses who attempted courtroom identification. It also tainted testimonal identification of defendant, critical because of the serious question whether the survivor-witnesses were describing defendant or another Russian at Treblinka.

COURTROOM IDENTIFICATION OF DEFENDANT

Turowski, the first-survivor witness, was asked to identify defendant in the courtroom on direct examination. He stood up in the witness stand and looked around the courtroom for forty seconds. Then Government counsel asked if the witness could come down from the witness stand to make an identification, if possible. The witness stepped down from the stand and took only one minute to make an identification of a middle-aged spectator sitting in the last row of the courtroom.[16] Apparently

[16] Turowski and each of the six survivors at Treblinka also testified at a trial in Dusseldorf in 1965 against 11 SS personnel. Most also testified in Dusseldorf in 1970 against Stangl, the Commandant at Treblinka. The court noticed that, according to the news article carried in the Miami Herald, May 31, 1978, describing Turowski's

sensing from the crowd reaction he had blundered, the witness backed away from the gentleman he had identified, then moved around the courtroom and in exactly another minute identified defendant.

The courtroom is square, approximately 40 feet to a side. Defendant sat approximately 22 feet from the witness stand, with his lawyer and associate, ages 30 and 36 respectively and translator, under 30. At the Government's counsel table sat four lawyers, whose ages ranged from 31 to 36.

The second witness Kohn never once looked at the spectators' section when asked to identify defendant in the courtroom. At this point the court became quite suspicious that Federal Evidence Rule 615 excluding witnesses, invoked by defendant at the beginning of the trial, was being violated. The court had given the instruction that witnesses were not to discuss the case among themselves. Kohn scanned only the counsel tables and easily identified defendant—not exactly a difficult task in view of defendant's age being twice that of any of the other seven persons at the counsel tables.

Czarny's performance at the witness stand was almost a carbon copy of witness Kohn in the identification of defendant, with the exception that Czarny was more theatrical.

Mr. Boraks was not asked to identify defendant and responded to questions by talking directly to his translator. His translator was located on the side opposite from defendant's location. Exactly eighteen minutes after he took the witness stand Boraks quickly turned more than 90 degrees to look directly at the position where defendant was sitting and without even scanning the courtroom he quickly looked back to the interpreter.

The court was convinced the witnesses were discussing the trial among themselves, at least; and at worst someone was coaching them. Defense counsel had made the motion to sequester witnesses at the beginning of the trial but had not objected to Ms. Radwiker remaining in

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error, at the Dusseldorf proceedings the German court would locate defendants among the spectators in order to test the identification ability of the witnesses.

the courtroom and sitting directly behind Government's counsel table after she had finished her testimony. Defense counsel now insisted the rule be enforced and that she be excluded from the courtroom; the court enforced the motion and excluded Ms. Radwiker from the courtroom for the remainder of the trial.

The in-court identification of defendant by the three witnesses would have been rather weak under any circumstances because of the obvious location of defendant (obvious except to Mr. Turowski) and the great difference between his age and that of the other seven persons at counsel tables plus defendant was the only one with a translator. However, because of the obvious discussion of the case by the witnesses in violation of the rule, the court rejects the in-court identification *in toto.*

IDENTIFICATION OF DEFENDANT

In addition to the grave identification deficiencies of the Government's case, there are many other grave flaws in the identification testimony of the Government's witnesses as well as the credibility problems. Perhaps it is understandable that there are flaws in identification evidence after 35 years. That is part of the difficulty the Government faced in trying to meet its burden of proof. Among the more obvious identification flaws: Turowski described defendant as "slightly Chinese-looking". However, defendant Fedorenko simply does not look Oriental. He doesn't now and he didn't in the picture attached to his visa application.

Kohn described defendant as "mean-looking", and when he walked around the courtroom there was the same "mean-looking" face. That was his explanation for being able to identify defendant in the courtroom.

Czarny testified that he could identify Fedorenko when he walked around the courtroom because there was the "same mean-looking face". After the two days of testimony in Connecticut before beginning the Fort Lauderdale portion of the trial, and also at the close of all the testimony, the court concluded that defendant had a kind-looking, not hard-looking face, somewhat courtly in ap-

pearance. In no way can this court conclude he has a mean-looking face at this time.

Czarny also emphatically identified defendant's exhibit #3 as Fedorenko and announced he could never make a mistake. Of course the photograph was not Fedorenko.[17] Boraks identified Fedorenko as being the only Soviet guard who wore black, completely contrary to the testimony of all the other witnesses about the uniforms worn by the Soviet guards. Witness Lewkowicz quickly looked away after the only incident when she described the atrocity allegedly committed by Fedorenko.

Epstein talked for over three hours in the interview with Israeli investigator Kolar but never mentioned anything about Fedorenko. He had trouble in identifying Fedorenko even from the suggestive photo spread. In addition to the inability to remember the alleged shooting of his hometown friend, whom he claimed was his stretcher-bearer partner, he was squirming when he realized he had blundered into an indefensibly inconsistent description of the event. His testimony against Fedorenko simply lacks credibility.

Fedorenko's cross-examination perhaps supplied the missing piece in the puzzle when the Government's counsel persisted in asking defendant to describe his zugwachmann Rohoza. Fedorenko testified that Rohoza was "just like me" in height and his hair color was "just like mine." The persistent questioning about Rohoza's appearance elicited this response: ". . . like my face, almost like my brother." And to a further question, that the

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[17] Czarny exhibited a number of other credibility flaws. He would become more theatrical when he was aware the court was watching him closely. His facial expressions would become more dramatic especially during his courtroom identification of defendant and his testimony after lunch on re-direct about his previous misidentification of exhibit #3 as being Fedorenko. Further, the witness clearly understood a number of questions in English but specifically denied any knowledge of understanding the English language, even to the court. This despite answering questions on more than one occasion without the benefit of a translator. One of those questions contained more than ten words. Witness Epstein also obviously understood English but denied it (also to the court) although his knowledge may not have been as extensive as Czarny's.

resemblance between the two was such they looked like brothers. The court watched Fedorenko even more closely than usual when that line of questioning began and the court is firmly convinced that the answers were given guilelessly. From observation of his testimony and demeanor the court concludes defendant is unsophisticated —and perhaps feeling some effects of being in his eighth decade (e.g., see p. 1419 of transcript). The court doubts defendant is aware at this time of the exculpatory nature of the answers.

At the close of cross-examination the court asked questions of defendant for 50 minutes. Although defendant denied committing the atrocities during direct-examination, the court wanted the key answer from defendant face-to-face without the necessity of any translation. Confident that its location in the questioning would not favor or disfavor defendant and confident that defendant understood the question completely, the court instructed the translator to ask the question whether defendant had done any of the shooting and beating of prisoners as testified to in the courtroom and instructed defendant to "Please look at me, tell me either nyet or da, did you?"

From about 10 feet away with unobstructed eye contact defendant's answer was sincere and strong: Nyet.

The court considered the answer credible.

Even without defendant's testimony, the Government's evidence on the claimed commission of atrocities by Fedorenko fell short of meeting the "clear, convincing and unequivocal" burden of proof. In fact, the court should have granted a motion for involuntary dismissal on those particular counts at the close of the Government's case. With defendant's testimony the Government's evidence left the court with suspicions about whether defendant participated in atrocities at Treblinka but they were only suspicions.

EXONERATION TESTIMONY BY RUSSIAN WITNESSES

At the beginning of the Fort Lauderdale proceedings, defendant filed a motion for continuance claiming that

there were six witnesses in Russia who could give exculpatory testimony. Defense counsel asserted that defendant had just brought these matters to counsel's attention because of his difficulty in communicating with defendant about the nature of the charges.

Defendant has been back to the Soviet Union three times in the 1970's: once in 1972 "as a tourist"; again in 1973 for approximately three months and in 1975 for a period of 50 weeks. In late September or early October of 1973, several weeks before his departure from the Soviet Union in November, defendant asserts the Soviet Union investigated him at some length concerning his status in World War II and activities at Treblinka. A Russian Colonel asked questions of him on three different days, for a period of six hours on one occasion. The only other witness he saw was a witness named Kuzmienko who was only interrogated for five or ten minutes. He said the Russians came for him in a car and took him to the city of Siemferopol in the Crimea. He claimed that the Russian investigation cleared him of any wrongdoing and that they had taken statements of the six persons, Nikolai Korotkey, Wasyl Wasylenko, Michael Dudnik, Petro Schelno, Ivan Schevchenko and Nikolai Rohoza, whose testimony he wanted to obtain for this trial. Defendant sought a continuance in order to obtain the testimony or evidence of these six persons, five of them guards at Treblinka as well as Rohoza, defendant's zugwachmann. The court urged both sides to begin immediately to obtain more information about the potential witnesses and the procedures available and necessary to obtain the evidence from them.[18]

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[18] The court suggested that the most preferable means would be by an evidentiary hearing with the court sitting as a special master although that apparently is precluded at this point by the resolution of the Judicial Conference. Of course, this cannot be done without the approval of the Soviet Government; however, the Soviet Government has given permission for a West German court to conduct hearings in the Soviet Union of Soviet witnesses in connection with a West German trial of various defendants for alleged atrocities at Majdanek, Poland. See *Miami Herald*, May 28, 1978.

In view of the court's prior order virtually demanding the use of live witnesses from Israel rather than deposition testimony,

At a post-recess hearing one evening after two weeks of trial and the Government not having rested its case, the court commented during colloquy on scheduling and the motion for continuance that it felt it was necessary in the interests of fair trial to give defendant an opportunity to present the testimony of these witnesses to corroborate his denial or claim of involuntariness. The court emphasized that it might be able to decide the case without the continuance but also recognized that, because of the uncertainty about obtaining testimony from the Russian witnesses, it might take years to obtain the testimony and decide the case.[19]

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the court felt it would be unfair to defendant if the obtaining of such testimony for defendant were to be limited to depositions or written interrogatories in presenting his corroborating testimony.

Next to an evidentiary hearing, the next most helpful means of presenting the evidence would be by video deposition but that possibility seems remote at best. Under the circumstances depositions by oral examination would have been the best feasible method and the least helpful would be depositions upon written interrogatories under letters rogatory. However, written interrogatories apparently are the only likely method of obtaining testimony from witnesses of the Soviet Union, per advice of the Administrative Office of the United States Courts which was communicated to counsel.

Of course, no fellow Russian or Ukrainian who was at Treblinka and now in the United States is about to come forward to testify. This is particularly true because the instant case reputedly is the first of many against East European prisoner-guards now in the United States. *See, e.g., Miami Herald* article, p. 1, dated July 20, 1978.

[19] The court felt an announcement had to be made to counsel in order to obtain maximum haste on their part in getting the testimony or whatever evidence could be obtained from the Russian witnesses.

The spectators had left the courtroom by the time of the hearing, and that seemed an appropriate time for the court to make its comment. The court was aware that the Jewish Defense League members were in attendance in the courtroom as spectators; the court was also aware that, when an Administrative Law Judge announced a continuance to permit the Government to obtain more evidence in a deportation hearing in Baltimore of an alleged ghetto guard in Latvia, the Jewish Defense League had staged what can be described as a riot in the courtroom. See news article, p. 6E, *Fort Lauderdale News* dated Dec. 4, 1977.

The court was well aware of the emotional nature of the issues in this case and wished to assure the citizens in South Florida

If the Soviet Government conducted an inquiry in 1973 and cleared defendant of any complicity in war crimes at Treblinka or of collaborating with the Nazis, such a proceeding would be interesting to muse about but it would not be admissible *per se* in an American court. The fact such an inquiry was held is indeed curious, particularly because defendant testified that amnesty was given by the Soviet Union in 1955. Edict on Amnesty for the Soviet Citizens who collaborated with the Occupying Powers During the Great Patriotic War 1941-1945, *Vedomosti Verkhovnogo Soveta SSSR* [official law gazette of the USSR] No. 17, at 345 (1955). Defendant volunteered this information. The court has concluded that it is not necessary to obtain the testimony of the Russian witnesses in order to decide the case.

POST-TREBLINKA

Following the uprising at Treblinka, Fedorenko and other Soviet prisoner-guards were transported by the SS back to Travnicki in different groups. One of the groups killed a German officer and fled after no other prisoner-guards would join them.

After a few days in Travnicki defendant was transported to Danzig with about 80 or so other prisoners, including Russians, Ukrainians, Byelo-Russians and Poles. Defendant served there as a guard for approximately eight months; the camp at Danzig was not a death camp. Defendant was then transferred to Poelitz, a prisoner-of-war camp where many prisoners died from starvation. At Poelitz he was used as a guard but never left the camp; defendant claimed the Germans didn't trust him and the others who were transferred to Poelitz,

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that any such continuances would not be of indefinite duration even though it might take many months and perhaps well over a year. The court attempted to communicate that matter but the attempt was either misconstrued or too little, too late. The misinterpretation of the length of a possible continuance apparently stimulated the Jewish Defense League into printing and handing out leaflets by the following afternoon demanding the disqualification and impeachment of the trial judge.

probably because the Russian army was getting closer. After five or six months at Poelitz defendant was transferred to Hamburg where he was assigned to guard produce and warehouses. After a short period of time the British occupied Hamburg; defendant worked for the British from 1945 to 1949.

In Hamburg defendant had a work uniform and an after-hours uniform. He described better conditions under the British: he received good food and 100 marks per month.

In 1945 the prisoners of the British were required to register and defendant listed his birthplace as Sarny, Poland because every Russian citizen had to return to the Soviet Union. He selected the town of Sarny because some friends suggested it. Defendant used his correct name and birth date on the registration, visa applications and relevant documents for naturalization.

The testimony of a fellow-inmate of the camp in Hamburg indicates there were about 1,000 persons there; all were Polish except 200 to 300 Russians, mostly Ukrainian, and the camp was supervised by Polish officers. When Russian investigators came seeking Russians for repatriation, Polish officers protected the Ukrainians and Soviet residents by advising the Russians that all residents of the camp were Polish.

Defendant feared repatriation as did the other Soviet citizens at the camp. One witness testified that thousands committed suicide rather than be repatriated to the Soviet Union.[20]

While residing at the displaced persons camp at Osdorf near Hamburg, defendant applied for an immigration visa giving his correct name and date of birth, listing his place of birth as Sarny, Poland. In his history, considered by the Displaced Persons Commission, the same information was given together with some additional information: that he was a member of the Greek Ortho-

[20] Defendant requested a continuance in the third week of trial in order to produce a witness who could testify that many Ukrainians committed suicide, including death by immolation, rather than suffer repatriation. The court rejected the motion for continuance on the basis the evidence would be merely cumulative.

dox faith and received his education at Sarny consisting of elementary school from 1915 to 1918. In addition he contended he was a farmer at Sarny until March 1942 when he was deported to Germany and employed as a worker at Poelitz.[21] A typist who evidently spoke English but not German mistakenly typed Pelez rather than Poelitz in both places it appears on the Displaced Persons Commission report. Clearly a German location could not be spelled Pelez and the court must presume that the case analyst and reviewing persons on the Displaced Persons Commission and, more importantly, the reviewing Vice-Consul knew Poelitz was a German location, particularly because it was identified as being "near Stettin." Jenkins testified vice-consuls received several months of German language training.

Defendant's application for a visa was executed before the Vice-Consul on October 12, 1949 at the Consular office at Wentorf near Hamburg. He was approved by the Vice-Consul for admission to the United States under the Displaced Persons Act and arrived in America on November 5th, 1949, and went to work on a farm in Litchfield, Connecticut. Unfortunately, and inexplicably, the Government did not find the Vice-Consul who approved defendant's application.

On November 21, 1950 defendant filed a Declaration of Intention listing his birthplace as Sivash in the Ukraine. The same information is provided in his Declaration of Intention filed April 7, 1951.

The Government called Kempton Jenkins, a career foreign service officer as an expert witness; he was

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[21] Poelitz is spelled with an umlaut in German, viz., Pölitz. It is located slightly less than 10 miles (15 kilometers) north of Stettin, per National Geographic Society map of Germany (1944). Inasmuch as Poelitz and Stettin have been situated in Poland since World War II, it is difficult to locate Poelitz by the German spelling in most atlases. However, see p. 50 of Rand McNally's International Atlas (1969) which lists both German and Polish spellings. The name is spelled incorrectly in the transcript.

The court located a village named Pehlitz in East Germany. It is apparently too small to be listed even in detailed atlases. Its co-ordinates place it twenty miles closer to Berlin than to Stettin. From the evidence the court concludes Poelitz is the location referred to in the Displaced Persons Commission report.

formerly a Vice-Consul reviewing Displaced Persons cases in South Germany subsequent to the time defendant came to America. Although the witness was a very engaging person, the court found a number of inaccuracies in his testimony and must therefore consider his testimony in the light of all the evidence.

Any Vice-Consul had a number of materials presented to him by an applicant for a visa. At that point the applicant had been interviewed by a voluntary sponsoring group (in defendant's case the Tolstoy Foundation) and by the Displaced Persons Commission. The Vice-Consul had a report from the Displaced Persons Commission as well as one from the Army CIC (Counter-Intelligence Corps) which checked any service record with the Axis forces. In addition, a report on conduct from the local German police was furnished together with any report from the Berlin Depository Center which contained a depository of Nazi party documents.

If a prisoner indicated he was with a labor force a check was made of the records as to that labor force. In the instant case, defendant did advise them he had been at Poelitz.

Jenkins testified that the persons to be excluded under the Displaced Persons Act were ones who participated in or acquiesced in crimes against humanity or against civilians or served voluntarily with Axis military forces. He stressed that the benefit of the doubt was to be given to the applicant and the objective was to make a humanitarian solution. He testified that many applicants were members of the East European Waffen SS (combat) divisions who claimed to be serving involuntarily. The Vice-Consul would have to decide whether to admit the applicant and testified the tendency would be to make a favorable judgment and admit the applicant. He testified that the Displaced Persons Commission and Vice-Consuls recognized that many East Europeans hated the Russians as much as they did the Germans. He also added the fact that the Russians might execute the applicant was a reality that was considered. He acknowledged that some visas were granted to members of General Vlasov's army (The "Army of the Damned"), although that

Army fought side-by-side with the Germans against the Russians and comprised Soviet volunteers.

Jenkins testified he knew of no camp guards whose applications were favorably processed but he admitted he only remembered three and his experience was with Dachau which was located in Southern Germany. He assumed the camps east of Germany, such as Treblinka and Sobibor, located to the east of Warsaw, would be more brutal because the German civilian population was less likely to learn of it. He also testified that thousands of Germans who were not Jewish were killed in concentration camps. The survivors' testimony about Treblinka indicates that only Jewish persons were exterminated plus a few gypsies.

Jenkins' testimony about the structure of the death camp organization was hardly expert and conflicts consistently with other evidence presented at the trial. For example, he testified that the Ukrainian guards had the same uniforms as the SS with only sightly different insignia. However, the unanimous testimony was the Germans wore their usual gray-green uniforms but the prisoner-guards didn't. He testified that the camp guards could get leave and get away from the camp and could transfer. The testimony was clear that they could not take leave (and go to Berlin, as Jenkins opined) but could only get a two-to-four-hour pass to visit a small village a couple of miles away.

The testimony of defendant refutes the assumption that the camp guards could transfer to other duty. Jenkins also testified that the Germans commandeerd all the best houses and the camp guards had excellent living conditions, had movies and were well-fed. There was no evidence about the quality of the meals or about movies in the camp but Soviet prisoner-guards lived in barracks rather than in "the best houses".

Jenkins also would have considered the kapos as excludable because they assisted the Germans. This is totally contrary to the reaction of every witness who survived Treblinka; each of the Israeli witnesses testified the kapos did only what they had to do and the witnesses were quite indignant when asked if they had ever testi-

fied against the kapos. The witnesses replied that there was no reason to do so. In addition, Jenkins speculated that the kapos were probably shot in 1945 during a period of retaliation, but the testimony was to the contrary.

The Constitution of The International Refugee Organization described in part II of Annex I "Persons who will not be [considered as displaced persons]." Under the second listing are two classifications:

> 2. Any other persons who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries. Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

It has troubled the court that the word "voluntarily" appears in connection with service with the Axis military forces but is deleted from the phrase in section 2(a). The concern arises because the traditional principles of statutory construction would hold that the deletion of the word "voluntarily" in one subsection while its inclusion in another compels the conclusion that *any* assistance, whether voluntary or involuntary, in connection with concentration camp treatment of civilian population would be sufficient to bar that person from being entitled to relief under the Displaced Persons Act. The difficulty with that construction is that it would bar every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp. Each did so involuntarily and under the almost duress. For example, working prisoners led arriving prisoners to the lazaret to be executed; or wore armbands as part of the ruse at the lazaret; or cut the hair of the females to be executed; others played in the orchestra at the gate as part of that ruse, etc. Technically, this is assistance. It is also absurb to deem their conduct as "assistance or acquiescence" inasmuch as it was involuntary—even

though the word "voluntarily" was omitted from the definition.

The Government listed witnesses who were Treblinka survivors and now reside in America, presumably as U.S. citizens. To interpret "assistance or acquiescence" without requiring it to be done "voluntarily" could imperil their status.

The Government's expert witness, Mr. Jenkins, opined that he would bar kapos from the benefits of the Displaced Persons Act because of their assistance to the SS in supervising the activities of the other Jewish prisoners. Unanimously the survivors of the Treblinka prison camp defended the actions of the kapos. They pointed that the kapos had administered beatings at the command of the SS with just enough strength to avoid getting themselves into trouble with the SS while not being severe enough to injure the prisoner. Here again, if the word "voluntarily" is not read into subsection 2(a) kapos also would be denied admission under the Displaced Persons Act.

To construe the definition in that fashion would be to thwart totally the most obviously deserving persons: the prisoners who survived death camps such as Treblinka.

WAS FEDORENKO'S GUARD DUTY VOLUNTARY?

The court has previously found Fedorenko did not volunteer to go to Travnicki and did not volunteer to be a guard at Lublin or Treblinka. Nor did he volunteer for Warsaw, Danzig, Poelitz or Hamburg.

The question still remains whether Fedorenko could have made some feasible choice other than serving as a guard, particularly at Treblinka. The court has already found that defendant could not have transferred to another division.

Fedorenko had rights that the typical prisoner of war does not have, for example: carrying a rifle and a pistol, being able to go on liberty for four hours and even being given some small stipend from the Germans. On the other hand, he clearly did not have the right to walk out

of the gate, go to a city of his choice, or catch a train to his home or wherever else he wanted to go. Although not a typical prisoner of war, he was clearly not one of the captors. He was in some limbo state of having privileges not usually conferred on a prisoner of war but still in a position where disobedience of any consequence or an attempt to escape would certainly result in death.

The privileges given to the Soviet prisoner-guards apparently were to mollify them enough to prevent disciplinary problems and also to prevent their revolting against their captors. The use of liberty for four hours to visit a nearby town seems calculated to keep the prisoner-guards contented while preventing their getting a safe headstart if they decided to escape. Defendant testified that four of them did try and were surrounded by the Germans in a house and apparently executed. Approximately 15 prisoner-guards attempted to escape from Treblinka and defendant was unaware of what happened to them other than the four. One prisoner-guard was executed for disobedience and all the prisoner-guards were compelled to watch.

At the time of the uprising on August 1, 1943 defendant and the other prisoner-guards near him fired over the heads of the prisoners under orders from the Commandant.[22] Defendant did not fire at any of the prisoners and the court doubts that he did anything other than shoot over their heads.

With the benefit of hindsight seated in a comfortable chair in an air-conditioned office it would be relatively easy to conclude that defendant should have turned his rifle on the SS on the day of the uprising or that he should have attempted to escape once he got to the nearby village. Defendant testified he discussed escape once with a fellow prisoner-guard but nothing further came of it.

However, the Code of Conduct for Members of the Armed Forces of the United States Imposing a Duty to Escape (Section III) was not promulgated until Execu-

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[22] When asked on cross-examination why he didn't shoot the commandant, he replied: "If you shoot the commandant, it is like shooting yourself."

tive Order No. 10631 dated August 17, 1955, after the Korean conflict. Previously with American military forces there had been only an unwritten tradition to escape although apparently a written duty was once published in 1863. No evidence was presented that defendant was under a Soviet duty to escape or that he had been so instructed in the few, presumably disorganized, days between Russian mobilization and his capture.

If Fedorenko had refused to carry out orders at Treblinka, there is little doubt from the evidence that his execution would have been swift and sure. It no doubt would have occurred before a formation of other prisoner-guards to serve as an example to them. For a prisoner-guard at Treblinka to have denounced publicly the SS and what they were doing there would indeed have been a dramatic act of decency. It also would have been a dramatic act of self-destruction. As a court of equity, this court cannot impose such a duty upon defendant.

CONCLUSIONS OF LAW

Based on the findings set forth the court now considers each count of the complaint.

There is no dispute that defendant lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany. This misrepresentation would have been cause to deny defendant's application for citizenship. *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 87 S.Ct. 666 (1967), *In Re Petition of Haniatakis*, 376 F.2d 728 (3rd Cir. 1967). However, in a denaturalization proceeding a different standard obtains. Despite the fact that the immigration laws prohibit giving of false answers [23] and that therefore any misrepresentation is "illegal", once citizenship has been confirmed it may be taken away only if it can be clearly and convincingly shown that the misrepresentation was "material" *Chaunt*

[23] The Act of May 22, 1918, as amended 40 Stat. 559, § 1(C) as in effect in 1949 prohibited the giving of any false statement in an application for permission to enter the United States. A similar provision in the current law may be found in Title 8 U.S.C. § 1325.

v. *United States*, 364 U.S. 350, 81 S.Ct. 147 (1960). Although *Chaunt* considered only the question of obtaining citizenship through "willful misrepresentation of a material fact", the court finds that the standard must be the same where the charge is "illegal procurement" by virtue of a false statement. See *In Re: Field's Petition*, 159 F. Supp. 144 (S.D.N.Y. 1958).

In *Chaunt* the Supreme Court held that proof of materiality requires clear and convincing proof that either (1) facts were suppressed "which, if known, would have warranted denial of citizenship" or (2) that their disclosure "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" 364 U.S. at 355, 81 S.Ct. at 149.

In the instant case the true facts regarding defendant's birthplace and nationality would not of themselves have justified denial of citizenship, for Ukrainians per se were not excluded under the Displaced Persons Act.[24]

Neither can the court conclude that the disclosure of these facts might have been useful in an investigation leading to the discovery of other facts possibly warranting denial of a citizenship. In fact, the truth regarding defendant's nationality and birthplace were revealed to the Government when defendant filed his Declaration of Intention in 1950 and again in 1951. Mr. Zimon, who interviewed defendant pursuant to his application for citizenship, testified that the disclosure of the previous false statement was not a cause for concern or further inquiry because it was a well known fact that many Ukrainians entering the country at that time had concealed their true nationality in order to avoid repatriation to the U.S.S.R. Further, Mr. Jenkins admitted de-

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[24] Displaced persons under the Act included any person who as a result of the actions of the authorities of Nazi or Fascist regimes, has been deported from or has been obliged to leave his country of nationality or of habitual residence. This definition would include Ukrainians who were forced from their homeland during the German invasion of the U.S.S.R.

fendant's being a Ukrainian was obvious from his name and religion.[25]

However, the question of defendant's whereabouts from 1942-1945 presents another matter. Defendant has admitted that he did not work in a factory in Poelitz, but instead worked as a prisoner-guard for ten months in Treblinka. However, he did serve as a prisoner-guard at Poelitz. If the Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission under Section 2(a) or 2(b) of the Displaced Persons Act. However, the knowledge of defendant's being at Poelitz whether as a forced laborer or a prisoner-guard would have triggered the search of the records as well.

The Government has argued that under *Chaunt* it is not necessary to prove that the facts which would have been revealed through the investigation would have required denial of citizenship; the Government contends it is sufficient that the conceded facts prevented the Government from making an investigation which *might* have resulted in a denial of citizenship.

The language in *Chaunt* is ambiguous. The word "possibly" in the phrase "possibly leading to the discovery of other facts warranting denial of citizenship" could be read to modify the entire phrase, thus supporting the Government's interpretation that existence of facts warranting denial of citizenship need only be a possibility. However, if this were the intent of the Court, it would have been clearer to state "facts which might warrant denial." On the other hand, it appears that the

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[25] Accord, and almost on all fours except it is an application rather than a denaturalization case: In Re Iwanenko's Petition, 145 F. Supp. 838 (N.D. Ill. 1956). Iwanenko came to U.S. in 1950 after defendant's arrival and the case describes the fear of repatriation in detail. Jenkins claimed there was no repatriation as late as 1949 and no reason to fear it. However, the Iwanenko opinion described how rumors were still circulating among Russian nationals. Of course, defendant listed Sarny, Poland as his birthplace in 1945 when repatriation was unquestionably a peril and he was consistent in his 1949 application.

proper grammatical interpretation is that "possibly" modifies only the first part of the phrase, meaning that the existence of facts justifying denial is presupposed, and the only question is whether the suppressed facts would have provided a link to their discovery.

This second interpretation has been adopted in two circuits. In *United States* v. *Rossi*, 299 F.2d 650 (9th Cir. 1962), the court considered whether the fact that defendant had personated his brother, a Chilean citizen thereby suppressing his true identity as an Italian, was material. The court found that although defendant thus succeeded in avoiding the quota restriction placed on Italians, the Government had not shown that defendant would not have been admissible because the quota had been filled, and the Government therefore had not met the burden of showing that the misrepresentation was material.

The Ninth Circuit more recently adhered to this same interpretation of *Chaunt* in holding in a deportation case that a suppressed fact is not material unless the truth would have justified denial of a visa. *LaMadrid-Peraza* v. *Immigration and Naturalization Service*, 492 F.2d 1297 (9th Cir. 1974).

Similarly, in *United States* v. *Riela*, 337 F.2d 986 (3rd Cir. 1964) the court cited *Chaunt* as holding that false statements are material if they resulted in the suppression of facts which if known would have warranted denial of citizenship.

Based on its reading of *Chaunt*, this court agrees with the interpretation followed in the Third and Ninth Circuits. The case of *Langhammer* v. *Hamilton*, 295 F.2d 642 (1st Cir. 1961) cited by plaintiffs, is not a denaturalization case and therefore is inapposite. Compare: *Nowak* v. *United States*, 356 U.S. 660, 78 S.Ct. 955 (1958) with *Berenyi* v. *District Director of Immigration and Naturalization Service*, supra. Therefore the court must determine whether the Government has presented clear and convincing proof that the true facts have warranted denial of citizenship.

APPROVAL OF DEFENDANT'S VISA APPLICATION

Witness Jenkins testified that a Vice-Consul's determination to approve or disapprove an application could only be overruled by the Counsel General, and that overruling didn't happen. If anything in an application indicated prior service in a labor battalion or German unit there would be an investigation made to see if applicant served voluntarily.

Although defendant did not mention Treblinka in his history given to the Displaced Persons Commission he did mention his service at Poelitz near Stettin although he described it as a factory worker rather than a prisoner-guard. The case analyst signed off on the Displaced Persons Commission report on August 30, 1949. It was more than six weeks later on October 12, 1949 when the Vice-Consul at Hamburg approved defendant's application for a visa.

What happened in the intervening time? Was no inquiry made into the German records about Fedorenko being in whatever units were at Poelitz? Unlikely—Jenkins testified such information would have triggered an inquiry. Did the inquiry show his status there? If so, did the Vice-Consul apply the test that Jenkins had described, resolving the doubts to the benefit of the applicants? After all, doubts were resolved in favor of members of General Vlasov's army and their applications were approved. We can't be sure because the Government did not produce the Vice-Consul to testify. Not only were the doubts often resolved in favor of applicants under the Displaced Persons Act, but the Supreme Court instructs the United States Courts to resolve the law "as far as is reasonably possible" in favor of the naturalized citizen. *Schneiderman*, 320 U.S. at 122, 63 S.Ct. at 1335. Therefore this court must resolve the doubt in favor of defendant as to Counts 1, 2 and 3. This court specifically holds that petitioner lawfully entered the United States.

Count 4 of the complaint charges defendant with giving a false answer to question #6 on the application form for citizenship (form N-400). That question asks "Have

you ever committed any crime, whether or not you were arrested? Inasmuch as the court has determined that the Government has failed to prove defendant's commission of any crimes, it cannot be said that defendant's answer was not truthful. Therefore the Government has failed to meet its burden as to Count 4.

Turning now to Count 5, question #7 asked defendant to list membership in any organizations, including foreign military service. Defendant listed only Russian military service in 1941. Mr. Zimon, the naturalization examiner who used red markings to indicate his additions, added "labor union at work" as an organization of which defendant was a member.

The Government contends that defendant willfully failed to reveal his status as an armed guard for the Germans [26] in response to the question.

It is clear that defendant served only in the Russian army until his capture in 1941. Defendant has maintained that he was a prisoner of war until his surrender to the British. It is clear that he was transported from place to place and was obliged to obey orders under penalty of death and was not free to do whatever he chose. In view of the evidence the court concludes that there would be strong reason in defendant's mind to view himself as a prisoner of war; it therefore cannot be said that his omission was wilful. *United States* v. *Tooma*, 187 F. Supp. 928 (E.D. Mich. 1960), *United States* v. *Profaci*, 274 F.2d 289 (2d Cir. 1960). Even if defendant clearly understood the question and wilfully concealed the truth, the court must necessarily hold in accordance with the previous findings that the false answer was not proved to be material.

Counts 6 and 7 charge defendant with not being a person of good moral character for the five years preceding naturalization both because of the commission of atrocities and because he lied on his N-400 form.

Good moral character is a difficult term to define. As the Supreme Court has stated, "the term, by itself is unusually ambiguous. It can be defined in an almost

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[26] The complaint originally charged defendant with being a member of the German Army. It was amended at the pretrial conference.

unlimited number of ways for any definition will necessarily reflect the attitude, experience and prejudices of the definer". *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 263 (1957). Thus it has been consistently held that to meet the requirements for citizenship a petitioner's character must measure up to that of the average citizen in the community in which he resides. *Brukiewicz* v. *Savoretti*, 211 F.2d 541 (5th Cir. 1954). Although the immigration laws require proof of good moral character only for the five years preceding naturalization [27] conduct outside the statutory period is relevant and should be considered.[28]

The evidence concerning Fedorenko's good conduct for 29 years in America is uncontroverted. In contrast, the evidence concerning defendant's conduct at Treblinka is fraught with conflict and uncertainty and is therefore inconclusive.

While it may be true that defendant was not completely candid in his interviews with Immigration officials, and that such "temporizing with the truth" should not be condoned, the court cannot find under the circumtances that defendant was guilty of the type of willful deceit which alone might justify a revocation of citizenship. It must be again emphasized that the burden is no longer on defendant to demonstrate his entitlement to citizenship. *Berenyi*, supra, but is on the Government to show clearly and convincingly that he is not. *Chaunt*, supra. The court therefore concludes that the Government has not met its burden as to Counts 6 and 7 of the complaint.

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[27] § 316(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1427(a).

[28] § 316(e), 8 U.S.C. § 1427(e) provides that the court may take into consideration as a basis for its determination the petitioner's conduct and acts at any time prior to that period.

THE EQUITIES INVOLVED—AN ALTERNATIVE BASIS FOR THE HOLDING

Even if the court were to find that defendant had willfully concealed material facts in applying for citizenship, the court's inquiry would not stop there. This denaturalization proceeding is a suit in equity, *Knauer* v. *United States, supra,* and equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just.

The authority of the Government to take away citizenship fraudulently or illegally procured has repeatedly withstood constitutional challenge. See *Johannssen* v. *United States,* 225 U.S. 227, 32 S.Ct. 613 (1912); *Schneiderman* v. *United States,* supra: *Luria* v. *United States,* 231 U.S. 9, 34 S.Ct. 10 (1913). Moreover, this right is ordinarily not subject to defenses of laches, *Costello* v. *United States,* 365 U.S. 265, 81 S.Ct. 534 (1961), estoppel, *United States* v. *Ness,* 245 U.S. 319, 38 S.Ct. 118 (1917) or res judicata, *Johannessen* v. *United States,* 225 U.S. 227, 32 S.Ct. 613 (1912). Of course, this does not mean that the Government's power to bring suit is not subject to any limitations. The grant of citizenship confers on the individual all the rights and privileges guaranteed by the Constitution, and the Government may not revoke that grant on the grounds that are arbitrary, punitive or discriminatory. See *Schneider* v. *Rusk,* 377 U.S. 163, 84 S.Ct. 1187 (1964); *Rogers* v. *Bellei,* 401 U.S. 815, 71 S.Ct. 1060 (1971).

The Supreme Court has held on several occasions that a certificate of citizenship shall be cancelled unless there has been strict compliance with the conditions imposed by Congress as prerequisites to the acquisition of citizenship. See *Maney* v. *United States,* 278 U.S. 17, 49 S.Ct. 17 (1928); *United States* v. *Ness,* 245 U.S. 319, 38 S.Ct. 118 (1917); *United States* v. *Ginsberg,* 243 U.S. 472, 37 S.Ct. 422 (1917).

However, court decisions in the area of denaturalization must be considered in light of the economic and

social concerns of the times, as well as the unique facts of each case.

Early in this century Congressional concerns in the area of immigration law focused on the economic and social problems created by an influx of immigrants.[29] The Immigration and Naturalization Act of 1906 instituted major procedural reforms in the administration of the laws in an effort to curb the widespread abuses occurring at that time.[30] Thus many of the early denaturalization cases reflect the judicial concern for strict compliance with procedural requirements.[31]

During the war and post-war era of the 40's and 50's the cases take on a different posture, as the Supreme Court was faced with denaturalization suits in which the charge of illegality almost invariably was the claim that defendant was not "attached to the principles of the Constitution." [32]

In this era the court was clearly concerned that citizenship not be revoked solely on the basis of one's political or ideological beliefs. Consequently the court began to exercise a virtually de novo right of review of lower court findings.[33]

Perhaps the most striking illustration of the scope of Supreme Court review is found in *Nowak* v. *United States*, 356 U.S. 660 (1957) where the court virtually

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[29] For a detailed outline of the history of the immigration laws see the Legislative History of the Immigration and Naturalization Act of 1952; reported at [1952] *U.S. Code Cong. & Ad. News*, 1653-1674; 1674-1682.

[30] *See* Gordon & Rosenfeld, *Immigration Law & Procedure* § 20.1, 20-10 thru 20-11 (1975).

[31] *See, e.g.*, U.S. v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422 (1917); U.S. v. Ness, 245 U.S. 319, 38 S.Ct. 118 (1917); Johannssen v. U.S., 225 U.S. 227, 32 S.Ct. 613 (1912).

[32] *See, e.g.*, U.S. v. Schneiderman, 320 U.S. 118 (1943), Baumgartner v. U.S., 322 U.S. 665, 64 S.Ct. 1240 (1944), Knauer v. U.S., 328 U.S. 654, 66 S.Ct. 1304 (1946), Maisenberg v. U.S., 356 U.S. 670, 78 S.Ct. 960 (1958), Nowak v. U.S., 356 U.S. 660, 78 S.Ct. 955 (1958).

[33] See Baumgartner v. U.S., 322 U.S. 665, 64 S.Ct. 1240 (1944).

dismissed the testimony of the witnesses and the findings of two lower courts. This case presents a startling contrast to the standards used in considering petitions for naturalization where the burden is on the petitioner. *See, e.g., Berenyi* v. *District Director, Immigration and Naturalization Service,* supra.

Similarly, the Court took a very hard look at the evidence in *Chaunt* v. *United States,* supra in order to conclude that the Government had not proven the significance of three minor arrests for membership in the Communist party, all omitted from defendant's application for citizenship.

In the late 50's and early 60's courts were faced with another category of cases as the Government began a program of seeking deportation of known or suspected underworld undesirables.[34]

Thus in *Costello* v. *United States,* 365 U.S. 265, 81 S.Ct. 534 (1961) the Court found no reason to apply the equitable principles of laches in favor of defendant.

A review of the Supreme Court decisions in denaturalization cases over the last few decades reveals no case in which the Court has been faced with the question of whether a district court has discretion to consider the equities in determining whether citizenship should be revoked after many years.

However, lower courts have exercised discretion in determining whether citizenship should be granted. For example in *Petition of R.,* 56 F. Supp. 969 (D. Mass. 1944) the court considered whether citizenship should be denied petitioner on the grounds that she had committed the crime of adultery. Judge Wyzanski observed that with respect to the requirement of showing good moral character: "Congress seems to have invited the judges to concern themselves not only with the technicalities of the

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[34] See Shaughnessy v. U.S. ex rel. Accardi, 349 U.S. 280, 75 S.Ct. 746 (1955). Among the cases which appear to be part of the Government's effort are U.S. v. Montalbano, 236 F.2d 757 (3rd Cir. 1958) *affirmed sub. nom.* Genovese v. U.S., 352 U.S. 952 (1956); U.S. v. Anastasio, 226 F.2d 912 (3rd Cir. 1955); Corrado v. U.S., 227 F.2d 780 (6th Cir. 1955); U.S. v. Oddo, 314 F.2d 115 (2d Cir. 1963).

criminal law, but also with the norms of society and the way average men of good will act . . . ." *Id.* at 971. The court went on to hold that under the circumstances the certificate of citizenship should be granted.

Similarly, in *In Re Bespatow*, 100 F. Supp. 44 (W.D. Pa. 1951) the court considered whether a conviction of manslaughter barred petitioner from citizenship. After examining the circumstances of the killing and considering petitioner's good behavior for 37 years, the court held that citizenship should be granted. Some courts have subsequently interpreted Section 101(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (f) as a limitation on the court's discretion in determining good moral character.[35]

It is clear that in defining the statutory criteria, the courts continue to exercise discretion in order "to ameliorate hardship and injustice which otherwise would result from a strict and technical interpretation of the law." *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812, 817 (9th Cir. 1964). *See e.g. In re Briedis*, 238 F. Supp. 149 (N.D. Ill. 1965); *In Re Edgar*, 253 F. Supp. 951 (E.D. Mich. 1966); *Flumerfelt* v. *United States*, 230 F.2d 870 (9th Cir. 1956).

Additionally, in *In Iwanenko's Petition*, 145 F. Supp. 838 (N.D. Ill. 1958), a case similar in many respects to the instant one and containing extensive facts outlining the fear of many Ukrainians about repatriation to the Soviet Union, the court did not stop with a technical analysis of whether petitioner's entry had been lawful under the Displaced Persons Act. Instead, the court went beyond technicalities to consider the humanitarian purposes of the law and concluded petitioner should not be excluded from citizenship.

Perhaps the best example of a court's applying an equitable and non-technical interpretation of the law is *United States* v. *Rossi*, 299 F.2d 650 (9th Cir. 1962). In that case the defendant had assumed the identity of his

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[35] Gutierrez-Sosa v. Del Guercio, 247 F.2d 266 (9th Cir. 1957); Petition for Naturalization of O—— N——, 233 F. Supp. 504 (S.D.N.Y. 1964); In re C—— C—— J—— P——, 299 F. Supp. 767 (N.D. Ill. 1969).

brother, a Chilean, so that he could circumvent the quota restrictions placed on Italian immigrants. As in this case, the government there argued that "the facts misrepresented were material to lawful entry and that Rossi was guilty of fraudulently misrepresenting them." *Id.* at 652. The court conceded that, "[m]anifestly, [Rossi's] intention was fraudulent." *Id.* However, the court looked for more than a technical violation of the law. It considered the heavy burden of proof placed upon the government by the Supreme Court in *Schneiderman* and *Chaunt*, and held that there had been an insufficient showing that permission to enter the country would have been withheld had the true facts been known.

If discretion may be exercised in a petitioner's favor in naturalization cases where the burden rests on petitioner, then surely the court can consider equitable and mitigating circumstances in a denaturalization case where doubts are to be resolved reasonably in favor of the citizen.

From the evidence and observing defendant for nearly three weeks in trial, the court concludes defendant is an unsophisticated man with very little education who is not only willing but anxious to work. He also is a man who is not interested in "making waves" or causing trouble.[36] Unquestionably the Germans spotted these qualities in him and selected him for training as a guard.

If the court were convinced that the allegations charging defendant with atrocities at Treblinka were true, there is no doubt that defendant would not be entitled to citizenship in a country which prides itself on its ad-

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[36] The court agrees with the assertion of defendant's counsel that Mr. Fedorenko wants to please and on cross-examination would finally give the answers he thought would please the questioner if the questions were slightly changed and the subject matter approached from a different angle. Consequently, the court tended to discount the later answer[s] given on a series of questions on the same subject on cross-examination. Despite the waiver of rights and the presence of an interpreter the court discounted the statement given the Immigration and Naturalization Service two years ago. With defendant's difficulty in communicating and his tendency to volunteer information that is harmful to his interest there was a pressing need for assistance of counsel.

herence to principles of equality and human dignity, and whose citizenry largely comprises descendants of immigrants who sought refuge from political oppression. However, this court must decide this case on the record before it and the strict burden of proof has not been met.[37]

The Court recognizes that "[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued" *Johannessen* v. *United States*, 225 U.S. 227, 241 (1911). Nevertheless, where defendant has been a responsible citizen and resident for twenty-nine years, and the record as to his conduct thirty-five years ago is inconclusive, the court finds that the equities should be weighed in favor of defendant. Neither is the equitable balance tipped against defendant by his answers in 1945 and 1949. He was a victim of Nazi aggression, fearful of repatriation, many years and many miles from a home he thought to be empty of his wife and children, and was longing for a chance in America.

Because the Government has failed to meet its burden of proof judgment is entered for defendant. Under the circumstances of this case equitable considerations would also require the same result.

DONE AND ORDERED this 25th day of July, 1978.

/s/ [Illegible]
United States District Judge

cc counsel of record

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[37] Because the court has not found defendant committed the atrocities the Government claims he committed at Treblinka, it is not necessary for the court to confront the issue of whether sufficient duress was shown (or could be shown, in the eyes of the law) by defendant to excuse such conduct. If the court had found that the Government met its burden of proof in establishing that defendant committed the alleged atrocities at Treblinka, then it would have been necessary for the court to have granted a continuance in order for defendant to present testimony of the Russian witnesses he claimed could exonerate him.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA

vs.

FEODOR FEDORENKO

FINAL JUDGMENT

Based on the findings of fact and conclusions of law contained in the court's memorandum opinion entered this date, judgment is hereby entered for defendant on all counts.

DONE AND ORDERED this 26 day of July, 1978.

/s/ [Illegible]
United States District Judge

cc counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2668-Civ-NCR

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FEODOR FEDORENKO, DEFENDANT

NOTICE OF APPEAL—Filed Aug. 24, 1978

NOTICE IS HEREBY GIVEN that the plaintiff, UNITED STATES OF AMERICA, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on July 25, 1978.

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal was mailed this 24th day of August, 1978, to Gregg J. Pomeroy, Esquire, Attorney for Defendant, 200 Southeast Sixth Street, 600 Courthouse Square Building, Fort Lauderdale, Florida 33301.

Respectfully submitted,

J. V. ESKENAZI
United States Attorney

By: /s/ [Illegible]
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OPINION OF UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 78-2879

UNITED STATES OF AMERICA, PLAINTIFF, APPELLANT

vs.

FEODOR FEDORENKO, ETC., DEFENDANT, APPELLEE

June 28, 1979

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before WISDOM, CLARK, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

This appeal raises an important question concerning the standard to be applied to the materiality of a misrepresentation by nondisclosure in an action for revocation of citizenship. The government brought this action to revoke the citizenship of Feodor Fedorenko, the defendant-appellee, a naturalized citizen. We agree with the government that the district court erred as a matter of law when it held that the defendant had not procured his citizenship by concealment of a material fact. We hold that it is not necessary that the government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship. Accordingly, we reverse and remand to the district court with instructions to revoke the defendant's certificate of naturalization.

I.

Fedorenko was born in the Ukraine in 1907. In 1941, while serving in the Russian Army, he was captured by German forces. According to his own admissions, the Germans trained him to serve as an armed concentration camp guard and sent him to Treblinka, Poland, a notorious extermination camp.

Following World War II, he worked as a laborer in Germany for four years. In 1949, he applied for admission to the United States under the Displaced Persons Act of 1948, 62 Stat. 1009. Before the district court, the defendant admitted that he had falsified his application for a visa for the United States by misstating his whereabouts during the war years and by failing to note his service as a concentration camp guard. He admitted that he deliberately stated on the visa application that he had been a farmer in Sarny, Poland from 1937 to March 1942, and that the Germans had forced him to work as a laborer from that date until the end of the war. Based on this visa application, an American vice-counsul classified the defendant as a displaced person and issued him a visa.

The defendant came to America in November 1949. He has resided in this country since that time and, as the government admits, has led an uneventful and law-abiding life. In 1969 he applied for naturalization. In response to a question on the naturalization application about any foreign military service, he noted his service in the Russian army in 1941. He did not reveal, however, that he had served in the German army as a guard at Treblinka. The Immigration and Naturalization Service (INS) examiner scrutinized the defendant's visa papers, including a report by the Displaced Persons Committee that the defendant had been a farmer and factory worker from 1941-1945. The examiner took these visa papers at face value and recommended that the defendant's application be granted. The defendant was naturalized in 1970.

The government filed this action under 8 U.S.C. § 1451 (a) to denaturalize the defendant on the theory that he

had procured his citizenship by concealment and misstatement of material facts. The district court refused to strip the defendant of his citizenship. *United States* v. *Fedorenko*, 1978, S.D. Fla., 455 F. Supp. 893. The court found that the defendant had made false statements in his visa application about his whereabouts during the war years and had failed to disclose his service as a concentration camp guard. The district court held, however, that the defendant's deception did not constitute material misrepresentation and concealment within the meaning of 8 U.S.C. § 1451(a). The court also rejected evidence that the government presented to support its allegation that the defendant had committed war crimes. Finally, the court held that, even if the defendant was guilty of making material misstatements and omissions, equitable considerations required the court to enter judgment for the defendant.

In this appeal, the government raises three challenges to the judgment of the district court. First, it asserts that the defendant's own admissions indicate that his naturalization resulted from material misrepresentation and concealment. Second, it argues that the district court erred in refusing to consider testimony by several survivors of Treblinka, who identified the defendant as a camp guard whom they had observed committing war crimes. Third, it argues that the district court erred in holding that equitable considerations may serve as an alternative ground for its judgment in favor of the defendant.

II.

8 U.S.C. § 1451(a) provides:

> It shall be the duty of the United States attorneys . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting (a naturalized citizen) to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation. . . . To assess the government's argument that the defendant's misrepresentation and con-

cealment were "material" under this provision, this Court must first examine the Displaced Persons Act, 62 Stat. 1009, the statute under which the defendant obtained his visa. In that Act, Congress allowed European refugees driven from their homelands by the war to emigrate to the United States without regard for the usual immigration quotas. Section 2(b)-(c) of the Act defined "eligible displaced person" largely by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization of the United Nations, 62 Stat. 3037. That constitution provided that the following persons did not qualify for displaced person status:

1. War criminal, quislings and traitors.
2. Any other persons who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

62 Stat. 3051-52. In addition, § 13 of the Displaced Persons Act itself provided that

> (n)o visas shall be issued under the provisions of this Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States.

62 Stat. 1014.

The government argues that, because the defendant's service as a concentration camp guard indicates that he voluntarily assisted the enemy in persecuting civil populations, he was not qualified for admission into the United States under the Displaced Persons Act. By failing in his visa application to reveal his whereabouts during the war years and his concentration camp guard service, the government continues, the defendant fraudulently ob-

tained his visa. His entry into and residence in the United States was unlawful [1] then, and his naturalization was invalid, since the statute under which he was naturalized required that he must have resided in the United States for at least five years "after being lawfully admitted for permanent residence".[2]

The government's argument hinges on its assertion that the defendant's statements on his visa application about his wartime whereabouts and his deliberate concealment of his service as a concentration camp guard were "material" within the meaning of 8 U.S.C. § 1451 (a). The government and the defendant agree that this Court must apply to the facts of this case the standard for materiality adopted by the Supreme Court in *Chaunt* v. *United States*, 1960, 364 U.S. 350, 81 S.CT. 147, 5 L.Ed.2d 120. The parties disagree, however, on the meaning of the *Chaunt* standard. To resolve their conflicting assertions, we examine *Chaunt* in detail.

In *Chaunt* the government sought to denaturalize the defendant because he had procured his citizenship by concealment and misrepresentation of his arrest record. He had stated on a form connected with his naturalization that he had never been arrested. In fact, he had been arrested three times: once for distributing handbills in violation of an ordinance, once for making a speech in violation of park regulations, and once for general breach of the peace. All of these arrests occurred at least ten years prior to the defendant's naturalization. Although the record in the case was not clear, it appeared that he was convicted of only one charge, that involving the park regulation. The district court canceled the defendant's naturalization, and the Court of Appeals for the Ninth

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[1] See § 10 of the Displaced Persons Act, 62 Stat. 1013 ("(a)ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States"). See also § 13(a) of the Immigration Act of 1924, 43 Stat. 153, 161, which was in effect when the defendant entered the United States.

[2] Immigration and Nationality Act of 1952, § 316(a), 8 U.S.C. § 1427(a).

Circuit affirmed. *Chaunt* v. *United States*, 1959, 270 F.2d 179.

The Supreme Court reversed. 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120. It first noted that in a denaturalization proceeding the government bears the burden of proof by "clear, unequivocal, and convincing" evidence. 364 U.S. at 353, 81 S.Ct. 147. The Court then held that a misrepresentation or concealment was material only if the government proved

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

364 U.S. at 355, 81 S.Ct. at 151. In applying these alternative materiality standards to the facts of the case, the Court found the government's evidence wanting. As to the first standard, the Court held that the "nature of the arrests, the crimes charged, and the disposition of the cases", in and of themselves, did not even approach clear and convincing evidence that would have warranted denial of citizenship on the ground that the defendant lacked good moral character or did not intend to abide by the laws of the land. 364 U.S. at 354, 81 S.CT. at 150. As to the second standard, the Court rejected the government's contention that disclosure of the arrests would have caused the Immigration Service to conduct an investigation in which it might have discovered that these arrests had involved activities on behalf of the Communist Party. The Court noted that the defendant had disclosed that he was an employee and member of the International Workers' Order (IWO). Even though the government considered the IWO to be controlled by the Communist Party, the Immigration Service had failed to make any investigation of the defendant's background. Since the Service had failed to investigate whether the relatively incriminating admission of involvement in the IWO indicated that the defendant was a Communist, the Court concluded that, had the defendant revealed that he had been arrested three times for petty offenses, the

Service would not hav begun an investigation that might have uncovered the defendant's political affiliation and resulted in denial of citizenship. Id. at 354-55, 81 S.Ct. 147.

The courts of appeals have disagreed on the interpretation to be accorded *Chaunt*. The defendant argues that this Court should adopt the analysis found in *United States* v. *Rossi*, 9 Cir. 1962, 299 F.2d 650, and *La Madrid-Peraza* v. *INS*, 9 Cir. 1974, 492 F.2d 1297. In these cases, the Court of Appeals for the Ninth Circuit held that, under *Chaunt*, a fact suppressed or misstated is not material unless the truth would have justified denial of citizenship. The government responds by asserting that the better analysis is found in *United States* v. *Oddo*, 2 Cir. 1963, 314 F.2d 115, *cert. denied*, 375 U.S. 833, 84 S.Ct. 50, 11 L.Ed.2d 63. In that case, the Court of Appeals for the Second Circuit held that a fact suppressed or misstated that would not, in and of itself, have warranted denial of citizenship is material nonetheless if its disclosure would have led the government to conduct an inquiry that might have uncovered other facts justifying denial of citizenship. *Cf. Kassab* v. *INS*, 6 Cir. 1966, 364 F.2d 806, 807; *Langhammer* v. *Hamilton*, 1 Cir. 1961, 295 F.2d 642, 648.

The district court adopted the approach of the Court of Appeals for the Ninth Circuit. It held that the government's evidence was not clear and convincing proof that the defendant's whereabouts during the war and his service as a concentration camp guard were, in and of themselves, ultimate facts warranting refusal to issue a visa and denial of citizenship. This finding, of course, was responsive to the first materiality test adopted in *Chaunt*—whether "facts were suppressed which, if known, would have warranted denial of citizenship". The district court then held that this finding also disposed of the government's argument that the defendant's deception was material under the second test in *Chaunt*—whether "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship". The district court held that under this standard the government must first prove

the existence of ultimate facts warranting denial of citizenship and then prove that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts. Since the district court had concluded that the government had shown no such ultimate facts; it granted judgment for the defendant.

(1) We hold that the district court's interpretation of the second materiality test of *Chaunt* was an error of law. That interpretation destroyed the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship. We read the second test to require only that the government prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship.

Our interpretation comports with the language of the *Chaunt* opinion. The phraseology of the two tests adopted in *Chaunt* does create some ambiguity about the meaning to be accorded the second test. In an earlier portion of the *Chaunt* opinion, however, the Court cited two unambiguous ways in which nondisclosure would be material:

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

364 U.S. at 352-53, 81 S.Ct. at 149. This passage parallels the Court's later statement adopting the two materiality tests. The passage indicates that the key to the second test is whether disclosure would have led the government to make an inquiry that might have resulted in denial of citizenship. Indeed, the decision in *Chaunt* was grounded in this analysis: since the government had failed to inquire about Chaunt's political affilication when it knew that he had been active in an organization the government believed was associated with Communist groups, there was no basis for believing that the govern-

ment would have made any inquiry if he had disclosed his rather insignificant arrest record.[3]

Our interpretation of *Chaunt* is further fortified when the ramifications of a contrary holding are considered. The approach adopted by the district court would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility.[4] If his deception is later discovered, the district court's approach would require the government to carry out three difficult tasks: to conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court and convincing evidence. As the government properly contends, if that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS. See *Ganduxe y Marino* v. *Murff*, 1959, S.D.N.Y., 183 F.

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[3] In a case predating *Chaunt*, the Court of Appeals for the Sixth Circuit made a clear and concise statement of this approach:

Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship . . . Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.

Corrado v. *United States*, 6 Cir. 1955, 227 F.2d 780, 784, cert. denied, 351 U.S. 925, 76 S.Ct. 781, 100 L.ed. 1455. As our discussion in the text indicates, we read the second test of *Chaunt* as adopting this approach.

[4] As we have noted, Fedorenko was admitted to the United States under the Displaced Persons Act. Section 10 of the Act provided that "(t)he burden of proof shall be upon the person who seeks to establish his eligibility under this Act". 62 Stat. 1013. The present provision placing the burden of proving eligibility upon the applicant for admission into the United States is found in 8 U.S.C. § 1361. An applicant for naturalization bears the burden of proving eligibility under 8 U.S.C. § 1429. See also *Berenji* v. *INS*, 1967, 385 U.S. 630, 636-37, 87 S.Ct. 666, 17 L.Ed.2d 656.

Suppl. 565, 567, *aff'd*, 2 Cir. 1960, 278 F.2d 330, *cert. denied*, 364 U.S. 824, 81 S.Ct. 61, 5 L.Ed.2d 53.[5]

As Mr. Justice Black has written, "(n)ot only is United States citizenship a 'high privilege', it is a priceless treasure". *Johnson* v. *Eisentrager*, 1950, 339 U.S. 763, 791, 70 S.Ct. 936, 950, 94 L.Ed.2d 1255 (dissenting opinion). To guard the integrity of this priceless treasure, the government must be accorded the authority to seek the denaturalization of those, who, in procuring citizenship, misstated or concealed facts that, if disclosed, would have led the government to conduct an inquiry that might have resulted in denial of citizenship.[6]

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[5] The commentators agree with our assessment of *Chaunt*. Appleman has stated that "(t)he inference (to be drawn from Chaunt) is that had the facts been of such nature that their disclosure would have been useful in an investigation possibly leading to ultimate denial, the Court would regard them as material". Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 272 (1962) (Emphasis in original). Similarly, Gorden and Rosenfield have asserted:

> One view would regard a misstatement as material only if the true facts, if disclosed, would have required denial of the naturalization. (Citing *United States* v. *Rossi*, 9 Cir. 1962, 299 F.2d 650). This position has not been generally accepted, and the Supreme Court has declared that a misstatement is material if disclosure would have justified denial of citizenship. (Citing Chaunt) The court stressed the importance of exacting full, frank, honest and unequivocal answers to questions and vigorously discouraged temporizing with the truth.
>
> Decisions in the lower courts generally have held the naturalization applicant to strict accountability for intentional deceptions, emphasizing the government's right to obtain full and truthful responses to its inquiries in the naturalization proceeding, so that it would be enabled to conduct any necessary investigation. (Citing, *inter alia*, *United States* v. *Oddo*, 2 Cir. 1963, 314 F.2d 115).
>
> 3C Gordon & H. Rosenfield, *Immigration Law and Practice*, § 20.4(b) at 20-14 (1979) (footnotes omitted). See also 1A id. at § 4.7c.

[6] As the text indicates, the second materiality test of *Chaunt* is satisfied in a denaturalization proceeding when the government proves by clear and convincing evidence that, if the misrepresented facts had been revealed, it would have conducted an investigation that might have resulted in denial of citizenship. This is the standard that the government has urged us to adopt. A less stringent alternative would require the government to prove only that dis-

III.

Before the district court, the government presented expert testimony designed to satisfy both the *Chaunt* tests. The expert witness, Kempton Jenkins, had served as an American vice-consul in Germany administering the Displaced Persons Act. He testified that the vice-consuls were responsible for deciding whether to issue a visa under the Displaced Persons Act and that, for all practical purposes, their decisions were final. According to Jenkins, the vice-consuls believed that any visa applicant who had served as a concentration camp guard was ineligible as a matter of law for a visa because that service constituted either persecution of citizens (war crimes) or voluntary assistance of the enemy. He stated that the vice-consuls considered "involuntary" camp guard service to be a contradiction in terms. To his knowledge, no person who was discovered to have been a guard ever attempted to convince the vice-consuls that his service had been involuntary; instead, Jenkins testified that these persons admitted that they had chosen to undertake that service rather than go into forced labor divisions because the life of a guard was more comfortable.

(2, 3) The district court found unpersuasive Jenkins's testimony that all concentration camp guards were automatically disqualified from obtaining a visa. The court then held that the government had failed to prove by clear and convincing evidence that the defendant's guard service was voluntary and therefore would have resulted in denial of a visa. That finding satisfied the first Chaunt test but, under our holding in Part II above, not

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closure might have led it to conduct an investigation that might have resulted in denial of citizenship. See *Kassab* v. *INS*, 6 Cir. 1966, 364 F.2d 806, 807. That the government chose to endorse the stronger of these standards may reflect an appreciation that, "in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt' ", *Chaunt*, 364 U.S. at 353, 81 S.Ct. at 149 (quoting *Schneiderman* v. *United States*, 1943, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796), and "the facts and law should be construed as far as is reasonably possible in favor of the citizen", Schneiderman, 320 U.S. at 123, 63 S.Ct. at 1335.

the second. The evidence before the district court clearly and convicingly proved that, had the defendant disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa.[7] The defendant, then, was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*. The defendant's assertion before the district court that his guard service was involuntary comes thirty years too late: by failing to disclose that service on his visa application, he prevented the government from conducting a timely investigation of whether he had served under duress or had committed war crimes. In addition, it is irrelevant whether the

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[7] Jenkins testified:

> Q. Mr. Jenkins, if either of those documents (the Displaced Persons Commission report or the visa application) had stated that the applicant had served as a guard at any concentration or death camp in occupied Poland during the war what would have been done?
>
> A. The answer is if there is any indication that the man had served or been involved in any of the concentration camps that (sic) we would have stopped the case right there, suspended it, and called for a further investigation by the CIC (Army Counter-Intelligence Corps) and the other sources we had available and I would of course interrogate the applicant in some depth and with some vigor at that point, and then after I had received whatever information I could dig up I would have reinterrogated at that point.

Tr. 766-67. The district court had refused to accord conclusive weight to Jenkins's testimony that disclosure of the defendant's guard service would have automatically resulted in denial of the visa in large part because the court felt that Jenkins defined "voluntariness" too narrowly and did not have a complete appreciation of the conditions existing at a concentration camp. It appears that the court found no fault with Jenkins's testimony on the processes by which the vice-consuls made their decisions regarding visa applications, and upon reviewing the record we believe that this testimony must be accorded substantial weight. Indeed, the district court found as a matter of fact that "(i)f the Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission under . . . the Displaced Persons Act", 455 F. Supp. at 915.

defendant perpetrated the fraud to avoid reparation to Russia, as he also has asserted, since the immigration law does not allow a defense that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth. See 8 U.S.C. § 1451(a).

IV.

Survivors of Treblinka who testified at the trial identified Fedorenko as having been an armed guard at the camp and as having committed acts of violence against the prisoners. We have held, however, that the defendant obtained his citizenship by misrepresentation and concealment of his whereabouts during the war years and his service as a concentration camp guard. Accordingly, we need not address the government's argument that it had proved that he had concealed his perpetration of war crimes at Treblinka. We must, however, consider the district court's alternative holding that, even if the defendant had made material misrepresentations and nondisclosures, equitable considerations required judgment for the defendant.

The district court held that "(t)his denaturalization proceeding is a suit in equity . . . , and equity demands the weight of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just". 455 F.Supp. at 918. The court then determined that the equities required judgment for the defendant. Id. at 921. It acknowledged that no prior cases had held that a district court had this authority in a denaturalization case, but nonetheless held that the authority exists because "lower courts have exercised discretion in determining whether citizenship should be granted". Id. at 919.

(4, 5) In so holding, the district court erred as a matter of law. There is a crucial distinction between a district court's authority to grant citizenship and its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character

and an understanding of the English language, basic American history, and civics. See 8 U.S.C. §§ 1423, 1427. The district courts must be accorded some discretion to make these determinations. See, e.g., Petition of R., 1944, D.Mass., 56 F. Supp. 969. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship. *United States* v. *Ginsberg*, 1917, 243 U.S. 472, 474, 37 S.Ct. 422, t1 L.Ed. 853. The denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship. Indeed, in amending that provision in 1961, Congress stated:

> Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time the citizenship is granted.

H.R. Rep. No. 1086, 87th Cong. 1st Sess. 39 (1961), reprinted in (1961) 2 U.S. Code Cong. & Admin. News, pp. 2950, 2983. Thus, what the Supreme Court said in *Johannessen* v. *United States*, 1912, 225 U.S. 227, 241-42, 32 S.Ct. 613, 56 L.Ed. 1066, and repeated in *Knauer* v. *United States*, 1946, 328 U.S. 654, 673, 66 S.Ct. 1304, 1314, 90 L.Ed. 1500, remains true today:

> An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.

REVERSED AND REMANDED. On remand, the district court is directed to enter judgment for the United States and to cancel the certificate of naturalization issued to the defendant.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2879

D. C. Docket No. CA 77-2668-CIV-NCR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

FEODOR FEDORENKO, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, CLARK and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded with directions to the said District Court in accordance with the opinion of this Court.

June 28, 1979

Issued as Mandate: Aug. 23, 1979
Reissued as Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Tel 504—589-6514
600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

August 15, 1979

TO ALL PARTIES LISTED BELOW:

No. 78-2879—UNITED STATES OF AMERICA *vs.* FEODOR FEDORENKO, ETC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Clerk, U.S. Court of Appeals

By /s/ [Illegible]
Deputy Clerk

cc: M. Alan Ryan
Mr. Phil Baum
Mr. Brian M. Gildea
Mr. Gregg J. Pomerov

SUPREME COURT OF THE UNITED STATES

No. 79-5602

FEODOR FEDORENKO, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby,granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 19, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320486 319

No. 79-5602

FILED
JAN 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

FEODOR FEDORENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 79-5602

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 57a-66a) is reported at 597 F. 2d 946. The opinion of the district court (Pet. App. 1a-56a) is reported at 455 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1979. A petition for rehearing was denied on August 15, 1979. The petition for a writ of certiorari was filed on October 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to disclose, in obtaining a visa in 1949, that he had been an armed guard at the Treblinka concentration camp during the Nazi occupation of Poland was a "material" misrepresentation of fact under 8 U.S.C. 1451(a).

2. Whether a district court possesses an equitable discretion to excuse a material misrepresentation of fact under 8 U.S.C. 1451(a) and to allow a person who procured his naturalization by fraud to retain United States citizenship.

STATEMENT

The United States brought this action in the United States District Court for the Southern District of Florida under 8 U.S.C. 1451(a)[1] to revoke the citizenship of petitioner, who was born in the Ukraine in 1907, entered the United States under the Displaced Persons Act, ch. 647, 62 Stat. 1009, in 1949, and became a naturalized citizen in 1970. The gravamen of the government's complaint was that petitioner had served as an armed guard at the Nazi concentration camp at Treblinka, Poland, from 1942 to 1943 and had concealed that fact

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[1] 8 U.S.C. 1451(a) provides in pertinent part:

> It shall be the duty of the United States attorneys * * * to institute proceedings * * * in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation * * *.

in applying for and obtaining a visa to enter this country.[2]

1. The evidence at trial showed that petitioner was captured by the Germans in 1941 while serving in the Russian army (Tr. 1254, 1258-1261). After being held in a series of camps, petitioner was selected to go to the German camp at Travnicki, Poland, a training station for concentration camp guards (Tr. 1275-1276, 1284, 1435). Petitioner was eventually assigned to the death camp at Treblinka, where he was issued a rifle and assigned to guard duty (Tr. 1439, 1297-1298, 1440, 1309). Petitioner was stationed at Treblinka for about a year, during which time he was awarded good conduct stripes and was given the rank or title of "oberwachmann" because of his proficient service (Tr. 1489-1492, 1499-1500).[3] Petitioner repeatedly acknowledged in his testimony that he knew that the Jews who arrived at Treblinka were being murdered (Tr. 1442, 1452, 1461, 1465, 1578).

After an armed uprising at Treblinka resulted in the closing of that camp, petitioner was transferred to a series of other camps, finally ending up in Hamburg when that city was liberated by the British in 1945 (Tr.

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[2]The United States bears the burden of proving its case under 8 U.S.C. 1451(a) by "clear, unequivocal and convincing" evidence. See *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960). The court of appeals found that the government had met that burden here (Pet. App. 64a).

[3]The government also presented six witnesses, each a survivor of Treblinka, who testified that they saw petitioner shoot, whip or beat prisoners at the camp. See, *e.g.*, Tr. 134-135, 143, 145, 267-268, 271, 322-323, 434, 435-442, 884-887, 973, 1014-1015, 1039-1040, 1056-1067, 1070, 1072. The court of appeals held that, in light of petitioner's admitted misrepresentation in obtaining a visa, there was no need to address the significance of this evidence (Pet. App. 65a).

1358-1365). Petitioner passed as a civilian at that time and for the next four years worked as laborer (Tr. 1365-1366, 1509).

In 1948, Congress enacted the Displaced Persons Act, ch. 647, 62 Stat. 1009, to enable refugees who had been driven from their homelands during and after World War II to emigrate to the United States without regard to otherwise applicable immigration quotas (Tr. 723-724). The Act's definition of "eligible displaced persons" entitled to visas excluded persons who "assisted the enemy in persecuting civil populations" or who "voluntarily assisted the enemy forces * * *." Constitution of the International Refugee Organization (IRO), Annex I, Part II, 62 Stat. 3051-3052.[4] In addition, the Act provided that no visas were to be issued to persons who were members of, or participated in, "any movement which is or has been hostile to the United States * * *." Section 13, 62 Stat. 1014.

In October 1949, petitioner applied for admission to the United States as a displaced person. As he admitted at trial (Tr. 1518-1522), petitioner willfully falsified his application for a visa by misrepresenting his whereabouts during the war years and omitting any reference to the facts of his Nazi service from 1942 to 1945. Instead, petitioner told investigators for the Displaced Persons Commission that he had been a farmer in Sarny, Poland, until 1942, when he was pressed into forced labor in a factory until 1945 (Govt. Ex. 2, V R. 1882; see Tr. 1518-1520).[5] Before a vice-consul of the United States,

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[4]The Displaced Persons Act adopted the Constitution of the IRO for purposes of determining who were "displaced persons." Section 2, 62 Stat. 1009.

[5]"R." refers to the record in the district court.

petitioner signed a sworn statement containing these false representations as part of his application for a visa to enter the United States under the Displaced Persons Act (Govt. Ex. 3a, V R. 1884-1885). Petitioner's falsehoods were not discovered at the time. As a result, petitioner was issued a visa as a displaced person, and he sailed to the United States the following month (V R. 1886).

The significance of petitioner's actions was described by Kempton Jenkins, who was proffered by the government and accepted by the district court, without objection by petitioner, as an expert witness on the interpretation and application of the Displaced Persons Act (Tr. 712, 715-716, 720-721, 726-727, 734). Jenkins testified, without contradiction, that anyone who had served as a guard in a concentration camp was ineligible as a matter of law for a Displaced Persons Act visa and that a visa was denied in every case where an applicant's guard service came to light (Tr. 760-767). Jenkins testified that guard service constituted persecution of civilians or voluntary assistance to the enemy (or both), either of which rendered an applicant ineligible for a visa under the Act (Tr. 768, 798; see page 4, *supra*).

In 1969, petitioner applied for naturalization as an American citizen. Again, he made no mention of his Nazi service, despite being asked to list all memberships and associations and past foreign military service (V R. 1892). The examining officials "took [petitioner's] visa papers at face value and recommended that [his citizenship] application be granted" (Pet. App. 59a), and it was (V R. 1902).

2. Following a non-jury trial, the district court entered judgment in favor of petitioner (Pet. App. 55a). It held that, as a matter of law, petitioner's admitted deception in applying for a visa was not "material" within the

meaning of 8 U.S.C. 1451(a) because the government had not proven that "the true facts would have warranted denial of citizenship" (Pet. App. 45a). The district court also held that, even if petitioner had willfully concealed material facts in his visa application, thus entitling the government to judgment, the court had power to consider the "equitable and mitigating circumstances" (Pet. App. 54a) of petitioner's law-abiding life in this country, and such circumstances required that petitioner not be denaturalized (*id.* at 55a).

The court of appeals reversed (Pet. App. 57a-66a). It held that, under *Chaunt* v. *United States*, 364 U.S. 350 (1960), a misrepresentation was material if the government proved "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (Pet. App. 61a, quoting *Chaunt* v. *United States*, *supra*, 364 U.S. at 355). Applying that standard to the facts of this case, the court of appeals held that "[t]he evidence before the district court [*i.e.*, the testimony of Kempton Jenkins] clearly and convincingly proved that, had [petitioner] disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa. [Petitioner], then, was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*" (Pet. App. 64a-65a). Furthermore, the court of appeals held (*id.* at 65a-66a) that the district court erred as a matter of law in concluding that it had authority to enter judgment for petitioner even if the materiality of his misrepresentation had been proven. The court stated that "[t]he denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship" (*id.* at 66a).

ARGUMENT

Petitioner admitted at trial that he had been an armed guard at the Treblinka death camp and had fabricated a wholly fictitious version of his whereabouts during the war years in a successful attempt to obtain a visa under the Displaced Persons Act to enter the United States. The undisputed testimony at trial on the operation and administration of the Displaced Persons Act was that no concentration camp guard was eligible for such a visa and that if petitioner had told the truth in 1949, he would not have received a visa. Indeed, the district court itself found that "[i]f [petitioner's] Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Consul to determine whether [petitioner was] * * * excludable from admission under Section 2(a) or 2(b) of the Displaced Persons Act" (Pet. App. 43a). The district court's error, as the court of appeals correctly pointed out, was in failing to realize that this finding of fact alone was sufficient under *Chaunt* v. *United States, supra*, to establish the materiality of petitioner's concealment.

As both courts below recognized, *Chaunt* is the leading case on what constitutes a "material" deception for purposes of revoking citizenship under Section 1451(a).[6] In *Chaunt*, the government brought a

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[6]Although the statute speaks of the "concealment of a material fact or * * * willful misrepresentation," we assume that concealment, no less than misrepresentation, must be willful (see *Costello* v. *United States*, 365 U.S. 265, 271 n.3 (1961)) and that misrepresentation, no less than concealment, must relate to a material fact.

Neither point is of particular concern in the present case, for petitioner admitted that his deception was willful (Tr. 1520), and whether the deception is labelled a misrepresentation or a concealment is, in this context, unimportant. What is important is the undisputed fact that petitioner concealed his service with the Nazis and misrepresented his activities during that period.

denaturalization action against a citizen who had been naturalized in 1940, alleging that he had concealed at that time a record of three arrests for handbilling, illegal demonstration and breach of the peace in 1929 and 1930. The government contended that these arrests were "material" facts because, had they been disclosed, the government assertedly would have investigated the arrests and discovered that they had resulted from Chaunt's activities on behalf of the Communist Party. Chaunt had admittedly answered "no" when asked if he had ever been arrested, and the government had never investigated Chaunt to determine whether he had been a Communist Party member. The district court ordered citizenship revoked, but this Court reversed.

The Court emphasized the seriousness of giving false or deceptive answers when seeking naturalization. It gave two reasons why "[f]ailure to give frank, honest, and unequivocal answers * * * is a serious matter." 364 U.S. at 352. First, "[s]uppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." *Id.* at 352-353.

But the Court rejected the government's contention that, had Chaunt disclosed his arrest record, the government would have begun an investigation which would have revealed that Chaunt was a Communist Party official in 1929. The Court did not minimize the importance of Chaunt's Communist affiliation, but it was not persuaded that any such investigation would have followed from disclosure of the arrests. Chaunt had disclosed on his naturalization application that he had been a member of the International Workers' Order (IWO), which the Court assumed to be a Communist

front. That disclosure, said the Court, was a "much less tenuous and speculative nexus with the Communist Party" than the arrests that the government complained of (364 U.S. at 355), yet the government had not investigated Chaunt at the time of his application despite the IWO revelation. The Court was unwilling to believe that the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations" was really material in light of the government's inaction when faced with more significant evidence of the affiliation *(ibid.)*.

The Court was careful to note, however, that, had Chaunt not disclosed his affiliation with the International Workers' Order, "failure to report the arrests would have had greater significance," for "[i]t could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355. But the Court concluded that the government had failed to show that either the arrests would have "warranted denial of citizenship" or that "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Ibid.*

In short, this Court in *Chaunt* was not willing to allow citizenship to be revoked for concealing facts that, even if disclosed, would not have triggered an investigation. A concealed fact is material, said the Court, only when it either would have justified denial of citizenship "in and of [it]sel[f]" or "might have led to the discovery of" disqualifying facts. The two tests of materiality are thus independent of each other, and this Court's use of the disjunctive establishes that denaturalization may follow

from a concealment that is material under either one of the tests. *Chaunt* v. *United States*, *supra*, 364 U.S. at 352-353, 355.

With the exception of the Ninth Circuit, all courts of appeals that have considered the question of what is a "material" deception under Section 1451(a) have correctly concluded that *Chaunt* allows materiality to be shown in either one of two ways. First, the government may prove that the facts that the defendant concealed or misrepresented, if revealed, would have themselves justified denial of citizenship. Second, the government may prove that the concealed or misrepresented facts, if revealed, might have been useful in an investigation possibly leading to the discovery of other facts justifying denial of citizenship. As the court of appeals explained it here, following *United States* v. *Oddo*, 314 F. 2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963), "a fact suppressed or misstated that would not, in and of itself, have warranted denial of citizenship is material nonetheless if its disclosure would have led the government to conduct an inquiry that might have uncovered other facts, justifying denial of citizenship." Pet. App. 61a-62a (citation omitted). As noted above, the district court found that the fact petitioner suppressed would have led to such an inquiry (Pet. App. 43a); its entry of judgment for petitioner was therefore erroneous, as the court of appeals held (Pet. App. 65a-66a).

Petitioner nonetheless contends (Pet. 11) that "a suppressed fact is not material unless the truth would have justified a denial of an [i]mmigration [v]isa." But as the court of appeals stated (Pet. App. 62a), this contention "destroy[s] the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship." This reading of *Chaunt* is consistent not only with the language of that decision

(see Pet. App. 62a), but with common sense as well. The court of appeals correctly observed (Pet. App. 63a; footnote omitted):

> [Petitioner's construction] * * * would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility. If his deception is later discovered, [petitioner's] approach would require the government to carry out three difficult tasks: to conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court by clear and convincing evidence.

As the court concluded, "if that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS" (Pet. App. 63a).

The court of appeals' approach is solidly based in precedent. As the Third Circuit said in rejecting the argument that petitioner now presents:

> The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity.

United States v. *Montalbano*, 236 F. 2d 757, 759 (1956). Accord, *Corrado* v. *United States*, 227 F. 2d 780 (6th Cir. 1955). The Second Circuit likewise has rejected petitioner's interpretation of Section 1451(a). In *United*

States v. *Oddo*, *supra*, 314 F. 2d at 118, then-Circuit Judge Marshall, writing for the court, stated:

> Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry which might conceivably lead to collateral information of greater relevance. United States v. Montalbano * * *; Corrado v. United States * * *. As the Court said in Chaunt, "An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry." 364 U.S. at 354 * * *. Oddo denied the Government the opportunity to make that enquiry.

The First Circuit has also read *Chaunt* in this fashion. In *Langhammer* v. *Hamilton*, 295 F. 2d 642 (1961), an action to avoid deportation, the alien argued that his former membership in the Communist Party was "involuntary" and thus under *Chaunt* his deliberate failure to disclose it on his visa application was not material. The court of appeals answered (*id.* at 648):

> In essence [appellant] argues that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. We do not believe this to be the law and, consequently, had we now agreed that appellant's membership was involuntary, such determination would not have operated *nunc pro tunc* to render his omission non-material.

This leaves only the Ninth Circuit as having expressed the view that the government must prove the existence of ultimate facts that would have justified the denial of

citizenship. See *United States* v. *Rossi*, 299 F. 2d 650 (9th Cir. 1962); *LaMadrid-Peraza* v. *INS*, 492 F. 2d 1297 (9th Cir. 1974). Those decisions are unsound for several reasons. First, as shown above, the Ninth Circuit was only half right when it stated that *Chaunt* "held that a fact suppressed or misstated is not material to an alien's entry unless the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298. That reading plainly ignores the second *Chaunt* test. Moreover, the Ninth Circuit's reading of *Chaunt* *provides* precisely the incentive to lie that other courts construing *Chaunt* have properly characterized as pernicious.[7]

Assuming that the Ninth Circuit would continue to adhere to *Rossi* and *LaMadrid-Peraza* in future cases, however, it is unnecessary for this Court to resolve the conflict here, because the undisputed evidence at trial shows that the judgment of denaturalization is correct even if the Ninth Circuit's reading of *Chaunt* is followed. That reading, as we have explained, effectively confines *Chaunt* to only the first test articulated in the opinion—that is, a concealment or misrepresentation is "material" under Section 1451(a), in the Ninth's Circuit's view, only if "the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298.

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[7]In addition, it is clear that the Ninth Circuit did not give careful consideration to the question. *Chaunt* was decided after *Rossi* had been briefed and submitted to the Ninth Circuit, and that court, although recognizing the importance of the case, apparently did not invite further briefing. *United States* v. *Rossi*, *supra*, 299 F. 2d at 652 n.3. To compound the matter, the *Rossi* court followed two 1938 appellate decisions that, in our view, could no longer be considered persuasive after this Court's decision in *Chaunt*. See 299 F. 2d at 652-653. *LaMadrid-Peraza* was a brief per curiam opinion that did not discuss *Corrado*, *Montalbano*, *Oddo*, *Langhammer* or other cases squarely in conflict with *Rossi*.

In this case, "the truth" of petitioner's wartime activities is undisputed. Petitioner admitted at trial that he was an armed guard at the Nazi death camp at Treblinka (see, *e.g.*, Tr. 1297-1331, 1442, 1452, 1467-1468, 1495, 1507-1509, 1546, 1564-1565). The government's expert witness on the administration of the Displaced Persons Act testified without contradiction that any visa applicant who had served as a guard in a concentration camp during the war was ineligible as a matter of law for a visa and that visas were in fact denied to every applicant whose concentration camp service was known (Tr. 760-767, 788, 790, 804, 805-809). On this evidence alone, then, the judgment of denaturalization is correct because "the truth would have justified a refusal to issue a visa." *LaMadrid-Peraza* v. *INS*, *supra*, 492 F. 2d at 1298.

The court of appeals, finding that the evidence at trial established materiality under the second and less restrictive of the two *Chaunt* tests (Pet. App. 64a-65a), declined to reach the question whether materiality had also been established under the first test. But, for the reasons just stated, the undisputed evidence plainly established materiality even under that test, and thus the Ninth Circuit would have reached the same result that the Fifth Circuit did here. In these circumstances, this case is not a proper vehicle to resolve whatever differences may continue to exist between the Ninth Circuit on the one hand and the First, Second, Third, Fifth and Sixth Circuits on the other.[8]

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[8]Petitioner contends (Pet. 12-14) that the evidence on this record is insufficient to establish that, had petitioner told the truth about his Nazi service to consular officials when applying for a visa, he would have been denied a visa. Petitioner's primary assertion in this regard appears to be that because the government did not actually produce the vice-consul who approved petitioner's visa, one cannot

2. Petitioner also contends (Pet. 14-15) that the district court correctly concluded (Pet. App. 49a-55a) that, even assuming that petitioner "had willfully concealed material facts," the court could preserve petitioner's citizenship in the exercise of its equitable jurisdiction " 'to ameliorate hardship and injustice * * *' " (*id.* at 53a). Although the district court recognized that its action was wholly unprecedented (*id.* at 52a), the court reasoned that it must have the same discretion to *refuse* to denaturalize as it has to *grant* naturalization (*id.* at 54a).

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say with assurance that that vice-consul would have denied petitioner's application had petitioner actually revealed his true background.

This assertion is unsound. Kempton Jenkins was proffered by the government, and accepted without objection by petitioner, as an expert in the administration and application of the Displaced Persons Act. His testimony, which was never disputed, was that concentration camp guards such as petitioner were categorically ineligible for visas. If petitioner wished to dispute that evidence, he should have done so at trial. Petitioner has never suggested any reason why he did not do so and, more to the point, he offers no reason to suppose that the vice-consul who dealth with petitioner's application, had he testified, would have disagreed with Jenkins. Petitioner's position is thus nothing more than an assertion that the district court should not have credited the undisputed testimony of the government's expert witness because it did not hear another witness who, petitioner speculates, might have given evidence contrary to the expert.

Nor did the court of appeals substitute its judgment on Jenkins' credibility for that of the district court, as petitioner asserts (Pet. 14). The district court itself found, on the basis of the expert's testimony, that if petitioner had revealed his Nazi service, an investigation would have resulted (Pet. App. 43a). The district court concluded as a matter of law, however, that this finding alone was not sufficient to revoke petitioner's citizenship under *Chaunt*. The court of appeals did no more than reverse the district court's legal conclusion. See Pet. App. 64a-65a.

This reasoning is incorrect, and the court of appeals properly rejected it (Pet. App. 65a-66a). As the court below stated (*id.* at 65a-66a; citations omitted):

> There is a crucial distinction between a district court's authority to grant citizenship and its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets [the] requirements for naturalization * * *. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship.

Petitioner offers no substantial answer to this self-evident proposition. Although he casts the district court's rationale as "not inconsistent with its holding that the Government failed to meet its burden" of proof (Pet. 15), the fact is that the district court's rationale was intended to be effective only if the court were reversed, as it was, on the materiality issue (Pet. App. 49a).

In short, even putting aside the question whether it is "equitable" to continue the benefits of United States citizenship to someone such as petitioner, the denaturalization statute simply does not empower the district court to do what it attempted here. As the House Report on Section 1451(a) remarked, "if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted," then the citizenship is "illegally procured." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961). And as this Court stated in *Johannessen* v. *United States*, 225 U.S. 227, 241 (1912), and repeated in *Knauer* v. *United States*, 328 U.S. 654, 673 (1946):

> An alien has no moral nor constitutional right to retain the priveleges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.

See Pet. App. 66a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5602

FEODOR FEDORENKO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinions below (A. 55-119) are reported in 597 F2d 946 and 455 F Supp. 893.

JURISDICTION

The judgment below was entered on June 28, 1979. A rehearing En Banc was denied on August 15, 1979 (A. 121).

Petition for Writ of Certiorari was filed on October 30, 1979, and was granted on February 19, 1980 (A. 122).

The jurisdiction of the Court rests on 28 U.S. Code Sec. 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act, of 1952, as amended (Act), 8 U.S.C. 145 (a), provided in part, as follows:

> "It shall be the duty of the United States Attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any Court specified in subsection (a) of Section 310 of this title (Sec. 1421 of 8 U.S.C.) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willfull misrepresentation..."

QUESTIONS PRESENTED

Whether proof of Materiality as required under 8 U.S.C. § 1451(a) and as set forth in *Chaunt* v. *United States,* 364 U.S. 350, 81S Ct. 147 requires under the se-

cond standard that the Government must prove the existence of ultimate facts which would have warranted denial of citizenship and that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts.

2. Whether under *Chaunt,* the Petitioner's failure to disclose his presence during World War II, at the Treblika Concentration Camp was a fact if known, that was sufficient to divest him of his citizenship.

3. Whether the United States District Courts have equitable powers to consider equitable and mitigating circumstances in a denaturalization proceeding as a basis for its holding and decision to deny naturalization.

STATEMENT OF THE CASE

Petitioner was born in the Ukraine in 1907. On June 23, 1941 he was mobilized into the Russian Army along with the truck he drove for the State. Within three weeks of the date of mobilization, he was captured by the German Army (A.63). After his capture he was transported from the Ukraine to Zytomer, then to Rovno in the Ukraine, then to Chelm, Travnicki, Lublin, Warsaw, Treblinka, bank to Travnicki, Poland, then to Poelitz and to Hamburg, Germany, all during the period of 1941 to 1945 (A. 63, 64, 65, 66, 83 and 84). Through most of this time period the Petitioner was forced to act as a guard under the direction and control of the German Army (A. 89-91).

At the end of the World War II, the Petitioner worked for British Occupation Forces from 1945 to 1949

(A. 84). When the Petitioner registered with the British he listed his birthplace as Sarny, Poland, and his nationality Polish-Ukrainian to avoid repatriation to the Soviet Union (A. 52, 84).

While at the displaced persons camp at Osdorf near Hamburg, the Petitioner applied for immigration to the United States. He stated his birthplace was Sarny, Poland, his occupation a farmer until March 1942, when he was deported to Germany to work at Poelitz (A. 23).

The Petitioner's application for a visa was executed on October 12, 1949 by United States Vice Consul Ralph G. Clark at Wentorf near Hamburg (A. 28, 29). Thereafter, the Petitioner arrived in the United States at Boston, Massachusetts on November 5, 1949.

On November 21, 1950 the Petitioner executed an Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention, wherein he declared he was born in Sivash, Ukraine (A. 30).

Thereafter, the Petitioner applied for Naturalization on October 4, 1969, and on April 23, 1970 he was issued a Certificate of Naturalization (A. 36).

On August 15, 1977 the United States Government commenced denaturalization proceedings against the Petitioner under 8 United States Code 145 (a) (A. 2-17).

The complaint alleged in Court I that the Petitioner gave false information in his application for Immigration Visa as to his birthplace and places of residence.

Count 2 alleges the Petitioner committed crimes or atrocities against civilians at Treblinka Concentration

Camp in Poland, and he was therefore not a displaced person under the Displaced Person Act, and not eligible for immigration to the United States.

Count 4 alleges the Petitioner willfully failed to disclose the commission of crimes at Treblinka in response to question #6 on Form N-400.

Counts 6 and 7 allege the defendant lacked good moral character required to become a citizen by commission of atrocities at Treblinka and giving false statements with regard to questions #6 and 7 on Form N-400 (A. 5-9).

The case was tried before Judge Norman Roettger in the United States District Court, Southern District of Florida, and the Court issued its decision on July 25, 1978 (A. 55-103), *United States* v. *Fedorenko,* 455 F. Sup. 893 (1978). The Court found the Government did not meet its burden of proof as to all counts of the complaint (A. 95-97).

The District Court further found the Petitioner was a prisoner of the German Army and was forced into involuntary guard duty (A. 65, 89).

The Court did find that the Petitioner lied on his Immigration Application when he gave his birthplace as Sarny, Poland, and stated he worked in a factory in Poelitz, Germany (A. 91).

The District Court held that the misrepresentation was not material as to nationality or birthplace, and would not have denied him citizenship, nor would the disclosure of the facts have been useful in an investiga-

tion leading to the discovery of other facts which might possibly result in a denial of citizenship (A. 92).

The Court then considered the materiality of the Petitioner's misrepresentation of his whereabouts from 1942 to 1945. The District Court found the Petitioner's disclosure of his presence at Poelitz, whether as a forced laborer or a prisoner-guard, would or should have prompted an investigation of records into the Petitioner's background (A. 93).

The Court found the Government failed to show that an inquiry had been made in response to information which would have prompted an inquiry (A. 93).

The District Court specifically held the Petitioner lawfully entered the United States and found for the Petitioner on Counts 1, 2, 3 and 4 (A. 95).

The District Court further held the Government failed to meet its burden of proof as to Counts 6 and 7, and found the Petitioner had not willfully deceived the Government (A. 96).

The Government's witness as to Policy and Procedures of Vice-Consul in administering the Displaced Persons Act was Kempton Jenkins, who served as Vice-Consul in Munich, Germany from March 12, 1951 for about eleven months.

The District Court found numerous inaccuracies in his testimony (A. 89). While the witness' testimony was informative as to the general procedures followed while he was in Germany, it did not establish what policies or procedures were employed at the time the Petitioner applied for his Visa in 1949.

The District Court rejected Mr. Jenkin's definition of Voluntary, and found that the Petitioner did not act in a voluntary way while a prisoner under the German Army (A. 89).

The Government failed to produce as a witness Vice-Consul Ralph G. Clark, who processed the Petitioner's Visa, leaving in doubt many questions as to what occurred in 1949 (A. 95).

The District Court's decision that the Government failed to prove that the concealed facts would have denied Fedorenko citizenship was based on a finding of the following facts:

a. Fedorenko's guard duty was involuntary (A. 65, 89);

b. the testimony of Kempton Jenkins contained inaccuracies, and was, therefore, considered in the light (of) all the evidence (A. 86);

c. Fedorenko lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany (A. 91);

d. the true facts of Fedorenko's birthplace and nationality would not justify denial of citizenship, and the disclosure of those facts would not have been useful in an investigation leading to discovery of other facts possible warranting denial of citizenship (A. 92);

e. if the Treblinka term had been known to Vice-Consul processing Fedorenko's Visa, it would have-prompted an investigation to determine if Fedorenko

committed atrocities at Treblinka or served voluntarily as a guard (A. 93);

f. the Government did not produce Vice-Consul who processed Fedorenko (A. 95);

g. the Vice-Consul would have to decide whether to admit the applicant, and would give the benefit of the doubt to the applicant, the tendency being to make a favorable judgment (A. 95);

h. the knowledge of Fedorenko being at Poelitz, whether as a forced laborer or a prisoner-guard, would have triggered an inquiry or search of records (A. 95);

i. Fedorenko did not mention Treblinka in his history to the Displaced Persons Commission; he did mention his service at Poelitz; and although the information should have triggered an inquiry, there is no mention of it (A. 93, 95);

j. the doubt as to whether there was an inquiry as to the mention of Poelitz or whether there would have been an inquiry as to it and Treblinka was resolved in favor of the defendant (A. 95);

k. the Court found the Government failed to prove the commission of any crime (A. 96);

l. Fedorenko had strong reason to view himself as a prisoner of war, and not an armed guard for the Germans (A. 96);

m. Fedorenko's good conduct for 29 years is uncontroverted, while the evidence of his conduct at

Treblinka is fraught with conflict and uncertainty, and is inconclusive (A. 97);

n. the Government did not meet its burden of proof as to Counts 1, 2, 3, 4, 5, 6, and 7 (A. 95-97); and

o. the Equities demand that due consideration be given to Fedorenko's 29 years as a responsible citizen, and the inconclusiveness of the record as to his conduct 35 years ago, and that equity requires judgment for Fedorenko (A. 98-103).

The Government appealed the decision of the District Court to the United States Court of Appeals, Fifth Circuit, claiming five questions of error. The Court of Appeals considered only three challenges to the lower Court ruling.

First, the Government asserted that the Petitioner's own admissions indicate his naturalization resulted from material misrepresentations and concealment.

Second, it claims the District Court erred in its rejection of testimony by several survivors of Treblinka.

Third, the Government claims the District Court erred in holding equitable considerations would serve as an alternate basis for its judgment for the defendant (A. 108).

The Court of Appeals, however, did not consider the second challenge which was the District Court's rejection of the testimony of the Treblinka survivors in reversing the decision of the lower court and remanding for directed judgment on behalf of the Government (A. 118).

Thus, the Court of Appeals, Fifth Circuit, decided two questions:

1. Did the Petitioner's naturalization result from material misrepresentations and concealment; and

2. Did the District Court err in holding equitable considerations would serve as an alternative basis for judgment for the Petitioner.

The Court of Appeals first addressed, as an important question, the standard to be applied to the materiality of a misrepresentation by nondisclosures in an action for revocation of citizenship (A. 106). This Court held the District Court erred as a matter of law, and that it is necessary to prove only that facts which the Petitioner misrepresented might, if disclosed, have led to the discovery of other facts which might have resulted in the denial of his citizenship (A. 113).

The Court of Appeals stated the District Court erred as a matter of law as to the standard to be applied to the materiality of a misrepresentation by nondisclosure and further erred in its alternative holding on equitable grounds (A. 106, 118).

The Court of Appeals stated:

> "It was not necessary that the Government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship." (A. 106).

> ". . . the key to the second test is whether disclosure *would have* led the government to make an inquiry that *might have* resulted in denial of citizenship." (A. 113)(Emphasis Added).

The Court of Appeals reversed the decision of the District Court and remanded that said Court revoke the Petitioner's citizenship.

SUMMARY OF ARGUMENT

The Decision of the District Court for the Southern District of Florida, which is 54 pages, contained within the Appendix, clearly shows that the Court gave careful consideration to all the evidence offered at trial, and applied its findings to the Immigration and Nationality Act, 8 U.S.C. § 1451(a), and the Supreme Court decision in *Chaunt* v. *United States.*

The holding of the District Court was that the Government failed to meet its burden of proof as to either test of materiality set forth in *Chaunt.* The District Court interpreted the *Chaunt* decision as requiring material proof of other facts or ultimate facts under the second test, which would warrant a denial of citizenship.

The Government's appeal was sustained by the Fifth Circuit Court of Appeals on the ground that the District Court's interpretation of *Chaunt* was error as a matter of law, and that the Government need not prove the materiality of the concealed other facts, but only that it was deprived of an opportunity to investigate further concealed facts. In addition, the Appeals Court

held that the Government had met its burden of proof through the testimony of Kempton Jenkins who indicated that had the Petitioner revealed his guard service at the interview, he would have launched an investigation.

Mr. Jenkins acknowledged that the Petitioner's disclosure of service at Poelitz should have triggered the same type of investigation, but apparently did not, and he arrived in Germany one year after the Petitioner's application was approved, and had no knowledge whatsoever as to identity, knowledge, or facts considered by the Vice-Consul who processed the Petitioner's application. The Petitioner argues the Appellate Court erred in its interpretation of *Chaunt*, and erred in finding proof of materiality by accepting the opinion of the expert which was not based on facts or knowledge derived at the time the Petitioner was being processed for Immigration.

The District Court also found as an alternative holding an equitable basis for its decision, a finding which was rejected by the Fifth Circuit Court of Appeals as an error of law.

The District Court decision states that in light of the uncertainty of the Petitioner's conduct 35 years ago, and his 29 years of good citizenship, all doubts, uncertainties and questions which have not been resolved unequivocally should be resolved equitably in favor of the Petitioner. Thus, the District Court considered its equitable powers as authority to find an equitable basis for its holding not inconsistent with its holding that the

Government failed to meet its burden under *Chaunt* (A. 54a, 55a).

Sound reasoning requires that a reading of *Chaunt* when applied to this case imposes upon the Government the burden of proof that requires complete proof of all issues in dispute by clear, convincing and unequivocal testimony; that testimony of an expert which is circumstancial and not based on facts as to his opinions, inferences, or conclusions should be rejected or limited.

Although the alternative holding appears to extend equitable power to the District Court not heretofore determined by any decision of the Supreme Court, there does appear to be sound judicial argument for its application in the present action.

ARGUMENT THE MATERIALITY QUESTION

In both decisions of the Fifth Circuit Court of Appeals and the United States District Court, Southern District of Florida in *United States* v. *Fedorenko,* the materiality test set forth in Immigration and Nationality Act § 340(a), 8 U.S.C. § 1451(a), and as expounded by the United States Supreme Court in the case of *Chaunt* v. *United States,* 1960, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed. 2d 120, was stated to be ambiguous and interpreted to have different meanings.

The District Court decision interprets the burden of the Government to be equally demanding to both tests under *Chaunt* (A. 91-94). That is to say, the Govern-

ment must establish by clear and convincing evidence that:

1. suppressed facts, if revealed, would warrant denial of citizenship; or

2. their disclosure might have led to other facts which would warrant a denial of citizenship.

Thus, the District Court's decision followed the same interpretation adopted in *United States* v. *Rossi,* 299 F2d 650 (9th Cir. 1962), *LaMadrid & Peraza* v. *Immigration and Naturalization Service,* 492 F2d 1297 (9th Cir. 1974), and *United States* v. *Riela,* 337 F2d 986 (3rd Cir. 1964). Essentially, the District Court held that it is the burden of the Government under both tests to establish by clear and convincing proof that true facts would have warranted a denial of citizenship (A. 94).

The Fifth Circuit Court of Appeals disagreed with the District Court's opinion of the Government's burden of proof, and held that under the second test, the Government need only show the concealed facts, if revealed, *might* have led to an investigation. It further held it was not necessary for the Government to prove that the ultimate facts would have warranted denial of citizenship (A. 106). This interpretation by the Court of Appeals appears to be a reversal of the meaning of the Supreme Court in *Chaunt.*

A. Materiality Standard

The citizenship standard within the meaning of 8 U.S.C. § 1451 (a) was interpreted by the Supreme Court

in *Chaunt* to require proof of the concealment of a material fact or misrepresentation by clear unequivocal and convincing evidence:

"(1) that facts were suppressed which, if known, would have warranted denial of citizenship; or

(2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355, 81 S.Ct. at 151.

Since the *Chaunt* decision there has been no Supreme Court decision involving the application of a second test or standard, although this important question was raised below in Appellate Court decisions:

In the case of *United States* v. *Rossi,* 299 F2d 650 (9th Cir. 1962) the court considered on appeal whether Rossi, who concealed his true identity by impersonating his brother who was a Chilean citizen, to avoid quota restrictions on Italians, committed a material misrepresentation that should revoke his citizenship. The Ninth Circuit Court's holding was that the Government must prove the existence of ultimate facts which would have justified the denial of citizenship.

In quoting from United States, ex rel. *Fink* v. *Reimer,* 96 F2d 217 (2nd Cir. 1938), the Court in *Rossi* said: A fact suppressed or misstated is not material to an alien's entry *unless* it is one which, if known, would have justified a refusal to issue the visa. Id at 652 (Emphasis Added)

The *Rossi* Court in effect found the Government had not shown that the misrepresentation would have resulted in a denial of an Immigration Visa because the ultimate and underlying fact, the true identity of Rossi, had not been shown to justify denial of citizenship.

Subsequently, in the case of *LaMadrid & Peraza* v. *Immigration and Naturalization Service,* 492 F2d 1297 (9th Cir. 1974), also a deportation case, that Court held a suppressed fact is not material unless the truth would have justified a denial of an Immigration Visa.

In *United States* v. *Riela,* 337 F2d 986 (3rd Cir. 1964), the Court interpreted *Chaunt* to hold that a material false statement results when suppressed facts, if known, would have warranted denial of citizenship.

In *United States* v. *Oddo,* 314 F2d 115 (2nd Cir.) cert. denied, 375 U.S. 833 (1963), it was held that a concealment of an arrest record for such crimes as homicide, assault and robbery denied the Government a means of investigating and discovering the content of the record which was relevant to statutory qualification for citizenship.

In the same Circuit, the Court, in the case of *United States* v. *D'Agostino,* 338 F2d 490 (2nd Cir. 1964), used the exact words of the Supreme Court in *Chaunt,* 364 at 353, when it held that a false statement is sufficiently material if "disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship."

In the Petitioner's case the District Court has followed the *Rossi, LaMadrid & Peraza, Riela* and *D'Agostino* cases as to how the second standard in *Chaunt* is to be applied to the facts of a case.

B. Proof Of Materiality

Proof of materiality must be by "clear, unequivocal and convincing" evidence, and not leave "the issue . . . in doubt." *Chaunt* v. *United States,* id; *Schneiderman* v. *United States,* 320 U.S. 118, 125, 158; *Baumgartner* v. *United States,* 322 U.S. 665, 670.

The District Court found that the Government had failed to prove the misstated and/or undisclosed facts would have warranted a denial of Fedorenko's citizenship (A. 92-94).

Although the defendant had not disclosed his presence at Treblinka and the involuntary service as a guard, the Government failed to prove these undisclosed facts would have prompted the Vice-Consul Ralph Clark to make an investigation. There was no evidence before the Court that the Vice-Consul knew the term Treblinka, and if known, would have responded with an inquiry as to the defendant's status. Furthermore, the Court rejected evidence that had the defendant disclosed his presence at Treblinka as involuntary service, he would have been denied immigration to the United States. In fact, the Court specifically found the defendant acted involuntarily at Treblinka and other locations (A. 89-91). The Court also rejected the opinion of Mr. Jenkins as to the voluntariness of Fedorenko's service as a camp guard (A. 87-89).

The District Court found unpersuasive the Government's claim that had the Petitioner revealed his presence at Treblinka an investigation *would* have ensued since the Petitioner revealed his presence at Poelitz; a term which should have also triggered an investigation, but apparently did not (A. 95).

This finding was very similar to the facts in the *Chaunt* case where the Supreme Court analyzed the materiality of the nondisclosure of an arrest record as compared to Chaunt' disclosure of his membership in an organization which is said to be controlled by the Communist Party. The disclosure of the union membership should have caused an investigation which would have revealed ultimate facts of Chaunt's membership in the Communist Party. The Supreme Court stated 364 at 355, "had that disclosure not been made in the application, failure to report the arrests would have had a greater significance."

Furthermore, the Supreme Court looked into the concealed facts of the arrests and the reasons for the arrests, and concluded the offenses charged were of slight consequence.

If ultimate facts need not be proved, why did the Court examine the ultimate facts beyond the concealed arrests? The answer, I believe, is because the ultimate facts must be materially significant and suffficient to justify denial of citizenship.

The District Court is in accord with the interpretation of *Chaunt,* and applied it directly to the instant

case. Whereas, the Court of Appeals claims this interpretation error and finds that the Government need only establish that an injury *might* result in denial of citizenship (bottom A. 113).

The Appellate Court, in an effort to find a basis for the proof of the second materiality standard, overlooked the District Court's findings, disregarded the Government's failure to produce the Vice-Consul who processed the Petitioner's application one year prior to Mr. Jenkins' arrival in Germany, overlooked the Petitioner's disclosure of service at Poelitz, and found that the Government had proved by clear and convincing evidence "that had the Petitioner disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa." (A. 117)

The Fifth Circuit Court of Appeals apparently substituted its judgment for that of Judge Roettger as to the weight to be given the Jenkins testimony, in opposition to its ruling in the case of *Vasquez-Mondragon* v. *Immigration and Naturalization Service* 562 F2d 1225 (5th Cir. 1977) wherein it held at page 1226 that it was not "permitted to substitute our judgment for that of the Board or the (Judge) with respect to the credibility of this testimony or the ultimate findings of fact based thereon."

Does not the testimony of Mr. Jenkins have little probative value in the absence of corrobative evidence or direct evidence which would establish the guidelines and the personal knowledge and manner in which the

Vice-Consul at Wentorf processed the Fedorenko Visa that day of October 12, 1949? (A. 39, 40)

The Fifth Circuit Court of Appeals disregarded the weight the District Court gave the testimony of Kempton Jenkins and found facts rejected by the District Court. *United States* v. *Fedorenko,* Id. 952, 953. (A.116)

In *United States* v. *Oddo,* 314 F2d 117, the Second Circuit Court said:

"Testimony as to custom and practice is admissable as circumstantial evidence, subject to the usual condition that its probative value outweighs any possible impact."

As the Fifth Circuit Court of Appeals noted in a 1974 decision of *Stanall* v. *McKenzie Tank Lines, Inc.,* (5th Cir. 1974), 497 F2d 529, "An expert must be in possesion of sufficient proved facts to enable him to express a reasonable accurate conclusion, and the facts upon which he bases his opinion must be disclosed . . ."The testimony of Kempton Jenkins was based on hearsay or speculation, and lacked a proper basis. His experiences and knowledge were acquired after the fact. Jenkins was not present in Germany at the time the Petitioner's application was approved, did not know the Vice-Consul who had processed the application, and had no knowledge of Treblinka (A. 39, 40).

Also, the Court of Appeals seems to hold that the Government's burden under the second *Chaunt* test is

less demanding and would permit denaturalization where the first test could not be met.

The Court of Appeals did not consider any of the alleged naturalization application misrepresentations as a basis for its reversal.

The Appellate Court overlooked the disclosure of service at Poelitz, which, according to the Government's witness, Jenkins, would have triggered an inquiry (A. 95), and although there is no proof that an inquiry was made, as a result of that disclosure, the Court nevertheless, finds that had the Petitioner disclosed his guard service, the American authorities would have conducted an inquiry (A. 117).

This is analagous to *Chaunt,* where the nondisclosed facts of an arrest record were claimed to deprive the Government of the opportunity to investigate further, when it also appeared that disclosed facts of union membership which should have prompted an inquiry, failed to do so. The Appellate Court's finding is contradicted by the fact that no apparent inquiry was made when it should have been as a result of the Petitioner's disclosure of his service at Poelitz.

AN EQUITABLE BASIS FOR THE DECISION

In addition to the District Court's ruling that the Government had failed under the *Chaunt* test to meet its

burden of proof, there was an alternative basis for the holding of the Court.

The Court ruled that the District Court could give equitable consideration in the denial of the Government's cause of action.

The Court held that since a denaturalization proceeding is an equitable proceeding "equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just." (A. 98)

The question of whether the District Court has discretion to consider the equities as an alternative basis for its holding in denying denaturalization was reviewed on appeal by the Fifth Circuit Court of Apeals, and rejected as error distinquishing the Court's authority to grant citizenship and its authority to revoke citizenship (A. 118).

The question is one of first impressions for the Supreme Court.

It is well recognized that a denaturalization proceeding is an equitable proceeding which does not afford a Constitutional guarantee of trial by jury. Also, the District Courts have consistently exercised equitable discretion in granting citizenship. *Wadman* v. *Immigration and Naturalization Service,* 329 F2d 812, 817 (9th Cir. 1964)

The District Court held that justice requires consideration of mitigating and equitable circumstances in a

denaturalization case, within certain limits of its discretion (A. 102, 103).

In the case of *In Re: Iwanenko,* 145 F. Supp. 838 (N.D. Ill. 1958), the court considered the petitioner's fear of forced repatriation as an equitable and mitigating circumstance to justify her misrepresentation of her place of birth.

There is no question that a denaturalization proceeding is a suit in equity. *Knauer* v. *United States,* 328 U.S. 654. The District Court concluded that "if discretion may be exercised in a petitioner's favor in naturalization cases where the burden rests on petitioner, then surely the court can consider equitable and mitigating circumstances in a denaturalization case where doubts are to be resolved reasonably in favor of the citizen." (A. 102).

Thus, the District Court considered the circumstances surrounding the Petitioner throughout World War II and up to the present time. The harship of the time, and the Petitioner's good record as to his conduct over the past twenty-nine years should, where doubts exist, preponderate in favor of the Petitioner. Reasonable bounds of discretion to consider the equities would not, as the Appellate Court fears, lead to an abuse of the law and a circumventing of the qualification requirements for citizenship. The courts should recognize that there may be equitable and mitigating circumstances that require consideration in applying the letter of the law when it involves the revocation of

citizenship and the resulting losses suffered by the defendant.

The commencement of denaturalization proceedings many years after the alleged occurrence in a foreign country often results in the impoverishment of the defendant, and his inability to obtain witnesses and documents in defense of the charges. Should an outstanding citizenship record be overlooked or considered where reasonable doubts exist as to proof of the allegation presented?

CONCLUSION

The judgment below should be reversed, and the case remanded to the Court of Appeals, Fifth Circuit, to affirm the judgment of the District Court.

Respectfully submitted,

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No. 79-5602

In the Supreme Court of the United States

OCTOBER TERM, 1979

FEODOR FEDORENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether petitioner's failure to disclose, in obtaining a visa to enter the United States in 1949 and in becoming a naturalized citizen in 1970, that he had served as an armed guard at the Treblinka concentration camp during the Nazi occupation of Poland was a "material" misrepresentation of fact requiring his denaturalization under 8 U.S.C. 1451(a).

2. Whether a district court possesses an equitable discretion under 8 U.S.C. 1451(a) to excuse a material misrepresentation of fact and thus to allow a person who procured his naturalization illegally or by fraud to retain United States citizenship.

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Comment, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471 (1980) ... 22, 26, 27

L. Dawidowicz, *The War Against the Jews, 1933-1945* (Bantam ed. 1976) 2

C. Gordon & H. Rosenfield, *Immigration Law and Procedure* (rev. ed. 1979):

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R. Hilberg, *The Destruction of the European Jews* (1961) 2

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H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961)..... 17, 36

S. Rep. No. 1515, 81st Cong., 2d Sess. (1950)..... 32, 36

OPINIONS BELOW

The opinion of the court of appeals (J.A. 106–119) is reported at 597 F.2d 946. The opinion of the district court (J.A. 55–103) is reported at 455 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals (J.A. 120) was entered on June 28, 1979. A petition for rehearing was denied on August 15, 1979 (J.A. 121). The petition for a writ of certiorari was filed on October 30, 1979, and was granted on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a), provides in pertinent part:

> It shall be the duty of the United States attorneys * * * to institute proceedings * * * in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation * * *.

STATEMENT

The United States brought this action in the United States District Court for the Southern District of Florida under 8 U.S.C. 1451(a) to revoke the citizenship of petitioner, who was born in the Ukraine in 1907, admitted to the United States in 1949 under the Displaced Persons

Act, ch. 647, 62 Stat. 1009, and naturalized in 1970. The complaint alleged that petitioner had served during 1942 and 1943 as an armed guard at the Nazi concentration camp in Treblinka, Poland, where he had beaten and shot Jewish prisoners, but that, in order to obtain a visa in 1949, petitioner falsely stated to American immigration officials that he had spent the war years as a farmer in Poland and a factory worker in Germany. The complaint further alleged that petitioner had continued this deception when he applied for and received American citizenship in 1970. Accordingly, the complaint charged that petitioner had been ineligible for admission to this country and, by concealing the facts that disqualified him, had illegally and fraudulently procured his citizenship (J.A. 4–10).

1. The evidence at trial showed that petitioner was captured by the Germans in 1941 while serving in the Soviet army (R. 1258–1261). After being held in a series of camps, petitioner was selected to go to the German camp at Travnicki, Poland, a training station for concentration camp guards (R. 1275–1276, 1284, 1435). Petitioner was eventually assigned to the death camp at Treblinka, where he was issued a rifle and assigned to guard duty (R. 1297–1298, 1309, 1439–1440).

Treblinka was described by the district court as "a human abattoir" (J.A. 66 n.12). Thousands of persons were brought to Treblinka each day to be murdered.[1] Petitioner was stationed at Treblinka for about a year, during which time he was awarded good conduct stripes and was given the rank or title of "oberwachmann" because of his profi-

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[1] Historians estimate that 800,000 people were murdered at Treblinka. See L. Dawidowicz, *The War Against the Jews, 1933–1945*, 199–200 (Bantam ed. 1976); R. Hilberg, *The Destruction of the European Jews* 572–586, 618–635 (1961). See also J.A. 68 n.12.

cient service (J.A. 47–48; R. 1499–1500). Petitioner repeatedly acknowledged in his testimony that he knew that the Jews who arrived at Treblinka were being murdered (J.A. 43, 45, 46).

In August 1943, the prisoners at Treblinka staged an armed uprising, and many escaped. As a result, the camp at Treblinka was closed, and petitioner was transferred to Danzig and Poelitz, where he continued to serve as a guard (R. 1358–1363, 1506). Petitioner eventually was transferred to Hamburg, where he served as a warehouse guard until British forces entered that city in 1945 (R. 1363–1365). Before the British arrived, petitioner discarded his uniform and was able to pass as a civilian. For the next four years, petitioner worked in Germany as a laborer (J.A. 51; R. 1365–1366).

In October 1949, petitioner applied for admission to the United States as a displaced person. The Displaced Persons Act, ch. 647, 62 Stat. 1009–1014, had been enacted by Congress in 1948 to enable refugees who had been driven from their homelands during and after World War II to emigrate to the United States without regard to traditional immigration quotas. Under that Act, "eligible displaced persons" were those displaced persons or refugees, defined in the Constitution of the International Refugee Organization of the United Nations (IRO) as the "concern" of the IRO (Section 2, 62 Stat. 1009).[2] The IRO Constitution (62 Stat. 3037–3055) provided that the following persons would not be considered the "concern" of the IRO:

1. War criminals, quislings and traitors.
2. Any other persons who can be shown:

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[2]The IRO Constitution was signed by the United States on December 16, 1946 (T.I.A.S. No. 1846) and became effective on August 20, 1948. See 62 Stat. 3037.

(*a*) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(*b*) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Annex I, Part II, 62 Stat. 3051–3052.[3] Section 10 of the Displaced Persons Act placed the burden of proving eligibility for admission under the Act on the person seeking admission and provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013.

The documentary evidence in this case demonstrates—and petitioner admitted at trial (J.A. 51–54)—that petitioner willfully falsified his application for a visa by misstating his whereabouts during the war years and omitting any reference to his Nazi service. Petitioner told investigators from the United States Displaced Persons Commission in 1949 that he had been a farmer in Sarny, Poland, from 1937 until March 1942, and that he had then been deported to Germany and employed forcibly as a factory worker in Poelitz until the end of the war, when he fled to Hamburg (J.A. 26, 51–52).[4] Petitioner also signed a sworn visa application stating that he had been in Poelitz from 1942 to 1945 (J.A. 29). Petitioner was thereupon issued a visa under the Displaced Persons Act. He sailed to

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[3]The IRO's footnote to 2(*b*) explained (62 Stat. 3052):

> Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." * * *

[4]Petitioner also gave his birthplace as Sarny, Poland, although he had been born in the Ukraine (J.A. 26).

the United States the following month and was admitted for permanent residence (J.A. 85).

After his admission to the United States in 1949, petitioner lived in Connecticut and led an uneventful and law-abiding life as a factory worker. In 1969, he applied for naturalization at the Immigration and Naturalization Service office in Hartford. The application (J.A. 32–35) made the following demand: "List your present and past membership in every organization, association * * * or similar group in the United States and in any other place, and your foreign military service." Petitioner answered: "Russian Military Service, 1941 to 1941" (J.A. 33).

On March 2, 1970, petitioner appeared before Harry Zimon, an INS naturalization examiner, for a preliminary examination on his eligibility for citizenship (C.R. 108–109.)[5] Zimon placed petitioner under oath and went over each question and answer on the naturalization application with him (C.R. 110–115). Petitioner made no mention of his service with the Germans at Treblinka or anywhere else (C.R. 126). At the conclusion of the examination, petitioner signed an affidavit that the answers he had given were "true to the best of my knowledge and belief" (J.A. 35; C.R. 121–122).

On the basis of the application and interview, Zimon recommended that the petition for naturalization be granted (C.R. 126). Zimon testified, however, that if petitioner had disclosed that he had served as an armed guard for or with the Germans during the war, or that he had served as a guard at Treblinka, Zimon would have refrained from making any recommendation until an investigation could be made "to ascertain all facts" (C.R. 127,

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[5] C.R. refers to the portion of the record containing testimony taken in Waterbury, Connecticut, on May 3 and 4, 1978. The trial resumed in Florida on May 30, 1978.

147–148). As it was, Zimon did question petitioner on his Soviet military service, but did not pursue petitioner's post-1941 whereabouts or military service, relying on the false information contained in the Displaced Persons Commission report (C.R. 216–217).

At the final hearing held before the naturalization examiner, petitioner was given a second opportunity to add any information or to correct any statements, but he volunteered nothing further (C.R. 214–215). His petition for naturalization was granted in due course by the Superior Court of New Haven County on April 23, 1970, and petitioner became an American citizen (J.A. 36).

2. The significance of petitioner's role as a guard at the Treblinka concentration camp was described by Kempton Jenkins, a career foreign service officer who had served as a vice-consul in Germany administering the Displaced Persons Act following World War II. Jenkins had been trained to administer the Act, had passed on approximately 5,000 visa applications under the Act, and was proffered by the government and accepted by the court, without objection, as an expert witness on the interpretation and application of the Act and on social and political conditions in Europe after the war (J.A. 37–38; R. 712, 720–721, 726–727).

Jenkins testified that if there were any indication that an applicant for a Displaced Persons Act visa "had served or been involved in" any concentration camp, processing of his case would have been suspended and a vigorous investigation conducted (J.A. 38). If it were determined that the applicant had served as a guard in a concentration camp, he would have been found ineligible for the visa as a matter of law (J.A. 38–39; R. 768, 822). This was so whether or not the guard had committed war crimes at the camp, because the mere fact of service as a guard was con-

sidered to constitute either persecution of civilians or voluntary assistance to the enemy (or both), either of which rendered an applicant ineligible under the Act (R.768, 797–798). See pages 3–4, *supra*. Jenkins testified that he was unaware of any instance in which a concentration camp guard had received a visa at any displaced persons camp (R. 787–788).[6] Sometimes, concentration camp survivors recognized an applicant as a guard and identified him to consular officials. The accusation was then investigated and, if found to be true, the applicant was confronted with it (R. 804). In all such cases, the visa was denied (R. 807, 826–827).

Moreover, Jenkins testified that not a single guard thus confronted ever claimed that he had served involuntarily; each had his own reasons for serving but each admitted that his service was voluntary (R. 807–808). Indeed, the experience of the vice-consuls indicated that camp guards always served voluntarily (R. 756, 772, 795–796), and the administration of the Act was such that no defense of involuntariness could possibly have been sustained (R. 822–826). Therefore, even if an applicant had claimed that his service was involuntary, he would have been denied a visa (R. 824–826) In short, "there was never a question raised" about the eligibility of concentration camp guards under the Displaced Persons Act; the Act was consistently applied to deny visas to any person who had served as a guard (R. 805–807).

Jenkins also described the elaborate system of interviews and investigations used to screen visa applicants under the Act. Each applicant was interviewed first by the IRO, then by a representative of the Displaced Persons

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[6] As a matter of administrative practice, when one vice-consul encountered an applicant who was shown to be a camp guard, he circulated the case file among the other vice-consuls (R.826). See note 29, *infra*.

Commission, then by one of the State Department's vice-consuls, and finally by the INS. Every available documentary file was checked in this process (R. 728–733). Nevertheless, Jenkins testified that if an applicant lied "and there was no negative information in any of these files on that person, there was virtually nothing for us to rely upon except the person's own declaration" (R. 738).

Jenkins' testimony also established that petitioner's falsehoods in his visa application—his statements that he had only been in Sarny, Poland, and Poelitz, Germany, during the war—could not have been the result of inadvertence or misunderstanding. The vice-consul went over each question with the applicant in his native language (R. 747–748). Jenkins testified that "we bent over backwards in interrogating [each] person to make sure he understood what he was doing" (R. 746).

3. Six survivors of Treblinka testified at trial to specific acts of violence that they saw petitioner commit at the death camp.[7]

Eugen Turowski, from a distance of five or six meters, saw petitioner shoot Jewish prisoners at the burning pit known as the "lazaret" (R. 134–136, 207). He also saw petitioner whip prisoners on arrival and shoot prisoners who had been captured after escape attempts (R. 143–145). Schalom Kohn testified that he saw petitioner almost every day for the first few months Kohn was at Treblinka (R. 262–263) and that petitioner beat him with an iron-tipped whip (R. 267–268). Kohn also saw petitioner whip arriving prisoners (R. 268) and shoot prisoners who were brought to the lazaret (R. 271, 322–323). Joseph Czarny

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[7]Each witness identified petitioner, both before trial and at trial, from a photo spread containing petitioner's 1949 visa photo (R. 59–61, 102–103, 601–602, 900–901, 907–909, 938, 968–969 (pre-trial); R. 147, 265, 429–432, 635–636, 973, 1074–1075 (trial)).

testified that he saw petitioner beat arriving prisoners (R. 434) and that he once saw petitioner shoot a prisoner at the lazaret (R. 435–442).

Gustaw Boraks testified that he repeatedly saw petitioner come to the camp's hair-cutting area and chase women to the gas chambers, beating them as they went (R. 886–888). On one occasion Boraks heard a shot and ran outside to see petitioner, with a gun drawn, standing within half a meter of a wounded woman (R. 630–634). Sonia Lewkowicz testified that she saw petitioner shoot a Jewish prisoner (R. 973, 1014–1015, 1039–1040). Pinchas Epstein testified that petitioner once approached a friend of Epstein's, made him crawl naked on all fours, and then shot him in the head, killing him instantly (R. 1056–1067). Epstein knew, "[w]ithout any question of a doubt" (R. 1070), that it was petitioner who had killed his friend.

4. Petitioner testified that he served as a guard at Treblinka, that he was awarded one or two stripes because of his good service (J.A. 40–41, 47–50) and that he knew that the Jews who were brought to Treblinka were being exterminated (J.A. 42–46). He testified, however, that he was ordered to go to Treblinka (R. 1298) and that he never beat or shot any Jewish prisoners (R. 1539), although he admitted shooting in the direction of escaping prisoners during the August 1943 uprising (J.A. 42, 50–51, 54). Petitioner testified that the Russian guards far outnumbered the German soldiers at Treblinka (R. 1444–1445) and that he was allowed to leave the camp regularly, but that he never tried to escape (R. 1467–1468, 1497, 1508). Petitioner also admitted that he willfully misrepresented his 1941–1945 whereabouts to the Displaced Persons Commission and to the vice-consul who processed his visa application (J.A. 51–54).

5. The district court entered judgment in favor of petitioner (J.A. 55–103). The court found that petitioner had served as an armed guard at Treblinka (J.A. 67) and that he lied when he applied for a visa to come to the United States by stating that he had been a farmer and factory worker during the war (J.A. 84–85, 91, 93). The court found, however, that petitioner's service at Treblinka was involuntary (J.A. 89–91). The court also concluded that the government had not proven that petitioner had committed war crimes at Treblinka because the court did not credit the Treblinka survivors' identification of petitioner or their testimony (J.A. 73–80).[8]

In light of these findings, the court concluded as a matter of law that petitioner's deception was not "material" within the meaning of 8 U.S.C. 1451(a). The court ruled that both tests of materiality set out in *Chaunt* v. *United States*, 364 U.S. 350 (1960), require that the government prove that "the true facts * * * warrant[ ] denial of citizenship" (J.A. 94). Although the court found that, had petitioner told the truth, consular authorities "certainly" would have conducted an investigation into the circumstances of petitioner's service at Treblinka (J.A. 93), it concluded that the government had not proven that petitioner's service was voluntary and thus that the truth would have required denial of citizenship (J.A. 89–91, 94–95).[9]

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[8]The court rejected the photo identification because the photo spreads were "impermissibly suggestive" (J.A. 76) and rejected the courtroom identifications because they were allegedly tainted by the photo spreads and by discussion of the case among the witnesses (J.A. 76–78). The court remarked that "the Government's evidence left the court with suspicions about whether defendant participated in atrocities at Treblinka but they were only suspicions" (J.A. 80).

[9]The court thus rejected Kempton Jenkins' uncontroverted testimony (see pages 6–8, *supra*) that no one who had served as a concentration camp guard would have been eligible for admission to the United States as a displaced person (J.A. 87, 89).

In addition, the court ruled that, even if it had found that petitioner had willfully concealed material facts, "equitable and mitigating circumstances" (J.A. 102) required that petitioner be permitted to retain his citizenship. Specifically, the court referred to the inconclusive evidence of petitioner's commission of war crimes and the uncontroverted evidence that he had been a law-abiding resident since coming to the United States (J.A. 103).

6. The court of appeals reversed (J.A. 106–119). Noting that *Chaunt* held that a misrepresentation is material if the government proves "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355), the court of appeals held that the district court had misinterpreted the second *Chaunt* test in ruling that it required proof of ultimate facts warranting denial of citizenship (J.A. 111–113). Rather, the court of appeals held that "the key to the second test is whether disclosure would have led the government to make an inquiry that *might* have resulted in denial of citizenship" (J.A. 113; emphasis added).

Applying the proper materiality test to the facts of this case, the court of appeals found "[t]he evidence before the district court clearly and convincingly proved that, had [petitioner] disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa. [Petitioner], then, was guilty of making a misrepresentation and concealment of material facts within the meaning of *Chaunt*" (J.A. 117; footnote omitted). The court of appeals further held (J.A. 118–119) that the district court erred as a matter of law in concluding that it had authority to enter judgment for petitioner

based on equitable considerations even if the materiality of his misrepresentation had been proven, finding that "[t]he denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship" (J.A. 119).[10]

SUMMARY OF ARGUMENT

Citizenship that is "illegally procured" or procured through "misrepresentation" or "concealment of a material fact" must be revoked under 8 U.S.C. 1451(a). Petitioner's citizenship should be revoked under either statutory theory. If petitioner gained an immigrant visa by concealing a material fact, he was never lawfully admitted to the United States. Hence, he lacked a statutory prerequisite for naturalization under 8 U.S.C 1427(a), and his citizenship was illegally procured. In addition, because his naturalization was made possible by his misrepresentation when applying for a visa, which was perpetuated in his application for naturalization, petitioner's citizenship was also procured by misrepresentation or concealment. Because petitioner has admitted that he concealed the fact of his guard service at the Nazi concentration camp at Treblinka, the critical question under either theory is whether that concealment was material.

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[10] Because it disposed of the case on the ground that the district court had misinterpreted the second *Chaunt* test, the court of appeals did not rule on the government's contention that it had also proven its case under the more exacting standard of the first *Chaunt* test, *i.e.*, that Jenkins' uncontroverted testimony that concentration camp guards were never issued visas established that petitioner's false statements suppressed facts that, if known, would have warranted denial of a visa. Similarly, the court of appeals did not rule on the government's contention that the district court erred in finding that petitioner had not committed war crimes at Treblinka. (The district court had discounted the eyewitness testimony because it held that the photo spreads were impermissibly suggestive and the courtroom identifications otherwise tainted.)

I.

A. *Chaunt* v. *United States*, 364 U.S. 350 (1960), held that concealed facts are material under 8 U.S.C. 1451(a) if they meet either of two tests: (1) the concealed facts, if known, would have warranted denial of citizenship or (2) "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355. The district court held that the second *Chaunt* test requires the government to prove not only that a truthful disclosure would have prompted an investigation but also that ultimate facts warranting denial of citizenship exist and might have been uncovered by that investigation. As the court of appeals noted, however, this interpretation "destroy[s] the utility" of the second *Chaunt* test (J.A. 113). Rather, the second *Chaunt* test of materiality requires that the government show only that the concealed facts, if revealed, would have raised a substantial question as to eligibility for citizenship such that they would have prompted an investigation that might have uncovered disqualifying facts.

The first *Chaunt* test places a severe burden on the government to prove the existence of ultimate facts demonstrating that a person is ineligible for citizenship. The manifest purpose of the second *Chaunt* test is to permit denaturalization on the basis of fraud without the necessity of proving conclusively that the person was not eligible for citizenship. Under this test, a misrepresentation is material if the truth, while not itself grounds for denial of citizenship, would have prompted an investigation that might have uncovered ultimate disqualifying facts. If, as petitioner contends, proof of a disqualifying fact is required under either test, the second *Chaunt* test is essentially a meaningless duplication of the first.

Adoption of petitioner's interpretation also would defeat Congress' demonstrated intent to discourage fraud in immigration and naturalization proceedings. If the government is forced to prove the existence of ultimate facts warranting denial of citizenship in every denaturalization proceeding, an applicant would have much to gain and nothing to lose by lying about his background in an effort to avoid an investigation into his past that might lead to a denial of citizenship. Even if the applicant's lie is later discovered, the passage of time will have made it more difficult for the disqualifying facts to be uncovered. Moreover, in the interim the burden of proof will have shifted from the applicant to the government, which must demonstrate his ineligibility in a denaturalization proceeding by clear and convincing evidence.

This case illustrates the pernicious consequences of petitioner's approach. Assuming *arguendo* that petitioner would have been admitted to the United States in 1949 had an investigation proven that his Treblinka service was involuntary, petitioner's misrepresentation prevented such an investigation from being conducted by the appropriate authority, the Displaced Persons Commission, at a time when witnesses were available and memories fresh. Now that petitioner's lie has been discovered and a definitive investigation is no longer possible, he asks that the courts assume that the investigation would have exonerated him. Congress cannot have intended a rule that would so reward deception in the immigration and naturalization process.

Indeed, petitioner's position not only frustrates congressional intent to discourage fraud but also violates the axiom that a statute should be construed to give meaning to all of its parts. 8 U.S.C. 1451(a) establishes two

grounds for denaturalization—illegal procurement and misrepresentation of a material fact. Petitioner contends that in proving a material misrepresentation the government must first prove ultimate facts warranting denial of citizenship. Proof of these facts, however, would also demonstrate that the defendant was ineligible for citizenship and, hence, that his citizenship was illegally procured. The misrepresentation provision of the statute would therefore become superfluous.

Finally, petitioner's interpretation gives the term "material" in 8 U.S.C. 1451(a) a definition far narrower than it receives in criminal statutes. For example, a false statement before the grand jury is material for purposes of a perjury prosecution whenever it has a tendency to influence the investigation, even if it does not actually affect the investigation or the grand jury's ultimate determination. Petitioner thus contends that Congress intended a false statement made by an applicant for naturalization to be material for purposes of criminal liability but not for the civil consequences of denaturalization.

B. Under the appropriate standard, it is clear that petitioner's misrepresentation was material. Petitioner admitted that he "willingly" misrepresented his whereabouts during the war. Furthermore, expert testimony not contradicted at trial established that petitioner would have been denied a visa if he had divulged that he had served as a guard at Treblinka. Accordingly, petitioner's misrepresentation was material under the first *Chaunt* test because the concealed fact, in and of itself, would have warranted denial of citizenship.

As the court of appeals correctly held, the district court's findings also establish that the misrepresentation was material under the second *Chaunt* test. The district court found that disclosure of petitioner's Treblinka serv-

ice "certainly would have prompted an investigation" into the voluntariness of his service and whether he committed atrocities (J.A. 93).

II.

Once a district court determines that a person willfully misrepresented a material fact in procuring his citizenship, it has no power to refuse to revoke that citizenship for equitable reasons. Courts may not alter the requirements established by Congress for immigration and naturalization.

In any event, even if courts possess an equitable discretion in this area, exercise of it on petitioner's behalf would be an abuse of discretion. Substantial evidence indicates that petitioner committed murder and other atrocities at Treblinka, and petitioner has admitted shooting in the direction of prisoners and repeatedly lying about his background. Petitioner's record as a law-abiding resident in the United States cannot weigh against this past as an equitable consideration in his favor; obedience to the law is the minimum expected of all citizens and aliens. Violation of the naturalization laws of the United States should not be excused merely because the individual has not subsequently committed any crimes.

ARGUMENT

PETITIONER SHOULD BE DENATURALIZED BECAUSE OF HIS FRAUDULENT CONCEALMENT OF HIS SERVICE AS A CONCENTRATION CAMP GUARD

A naturalized citizen may lose his citizenship only if the government can prove that the naturalization was "illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C.

1451(a).[11] This proof must be by clear and convincing evidence. *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960); *Schneiderman* v. *United States*, 320 U.S. 118, 125, 158 (1943). We submit that the government has met this standard in this case and has demonstrated by clear and convincing, indeed undisputed, evidence that petitioner's naturalization was procured both illegally and by fraud.

Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization is] granted." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961). See *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971); *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917). One statutory requirement is that a person be "lawfully admitted to the United States for permanent residence." 8 U.S.C. 1429, 1427(a). Petitioner was not "lawfully admitted" because he misrepresented his whereabouts during the war in order to obtain an entry visa, thus making him ineligible for admission under Section 10 of the Displaced Persons Act.[12] Hence, his naturalization was illegally pro-

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[11] This case, of course, does not involve the situation where a citizen surrenders his citizenship by expatriation, which requires proof of the citizen's intent. See *Vance* v. *Terrazas*, No. 78-1143 (Jan. 15, 1980). It is well-established that "naturalization unlawfully procured can be set aside" regardless of intent. *Afroyim* v. *Rusk*, 387 U.S. 253, 267 n.23 (1967).

[12] Section 10 provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013. In addition, at the time of petitioner's entry, Section 13(a) of the Immigration Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952), provided that "[n]o immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *." The courts consistently held that Section 13 required a valid visa and that a visa obtained by a material misrepresentation was not valid. See, *e.g.*, *Ablett* v. *Brownell*, 240 F.2d 625, 629 (D.C. Cir. 1957); *United States ex rel. Jankowski* v. *Shaughnessy*, 186 F.2d 580, 582 (2d Cir. 1951).

cured within the meaning of 8 U.S.C. 1451(a). See *United States* v. *Riela*, 337 F.2d 986 (3d Cir. 1964). See also *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, 133 (1932); *Werblow* v. *United States*, 134 F.2d 791, 792 (2d Cir. 1943). In addition, because petitioner's naturalization was made possible by his misrepresentations in applying for a visa and because those misrepresentations were perpetuated in his application for naturalization, his naturalization was procured by misrepresentation or concealment within the meaning of 8 U.S.C. 1451(a).[13]

Whether petitioner's citizenship is considered to be illegally procured or procured by misrepresentation, the primary basis for its revocation is petitioner's false representations concerning his whereabouts during World War II. Accordingly, we agree that petitioner's wartime activities, specifically his guard duty at Treblinka, must be shown to be "material" facts within the meaning of 8 U.S.C. 1451(a). We submit that the undisputed evidence in this case establishes, under the proper legal standard, that petitioner willfully misrepresented material facts. Petitioner's own testimony establishes that he served as a guard at a Nazi death camp and that he deliberately concealed this fact, substituting a fictitious background, when

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[13] Although the statute speaks of the "concealment of a material fact or * * * willful misrepresentation," we assume that concealment, no less than misrepresentation, must be willful (see *Costello* v. *United States*, 365 U.S. 265, 272 n.3 (1961)) and that misrepresentation, no less than concealment, must relate to a material fact.

Neither point is of particular concern in the present case, for petitioner admitted that his deception was willful (J.A. 52), and whether the deception is labelled a misrepresentation or a concealment is, in this context, unimportant. He concealed his service with the Nazis and misrepresented his activities during that period. As the court of appeals characterized the matter, it was "misrepresentation by nondisclosure" (J.A. 106). We therefore use the terms "misrepresentation" and "concealment" interchangeably in this brief.

questioned about his wartime activities. Moreover, it is undisputed that, had petitioner told the truth, an investigation into the circumstances of his concentration camp service would have been conducted. Petitioner's misrepresentation was therefore "material" within the meaning of 8 U.S.C. 1451(a).

I. PETITIONER'S MISREPRESENTATION WAS MATERIAL UNDER 8 U.S.C. 1451(a)

A. A Misrepresented Fact Is Material If Disclosure Of The Truth Would Have Led To An Investigation That Might Have Revealed Facts Warranting Denial Of Citizenship

1. *The Courts have not Interpreted the Materiality Standard of 8 U.S.C. 1451(a) to Require Proof of Ultimate Facts Warranting Denial of Citizenship*

a. The leading case on what constitutes materiality for purposes of revoking citizenship under 8 U.S.C. 1451(a) is *Chaunt* v. *United States*, *supra*. In *Chaunt*, the government brought a denaturalization action against a citizen who had been naturalized in 1940, alleging that he had concealed at that time a record of three arrests for handbilling, illegal demonstration and breach of the peace that had occurred in 1929 and 1930. The government contended that these arrests were "material" facts because, had they been disclosed, the government would have investigated the arrests and discovered that they had resulted from Chaunt's activities as an official of the Communist Party, an affiliation that presumably would have disqualified him from citizenship. As it was, the government had never investigated Chaunt to determine whether he had been a Communist Party official.

Although Chaunt admittedly had lied about his arrest record, this Court reversed the district court's order revoking citizenship. The Court emphasized that "[f]ailure to give frank, honest, and unequivocal answers * * * is a serious matter" for two reasons. 364 U.S. at 352. "Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." *Id.* at 352-353. However, the Court rejected the government's contention that truthful answers from Chaunt would have prompted an investigation that might have revealed that Chaunt was a Communist Party official in 1929, and it therefore found that Chaunt had not concealed "material" facts.

The Court did not minimize the importance of Chaunt's Communist affiliation, but it was not persuaded that an investigation would have followed from disclosure of the arrests. The Court remarked that Chaunt had disclosed his membership in the International Workers' Order (IWO), which the Court assumed to be a Communist front, yet that disclosure had not prompted an investigation into Chaunt's Communist connections. The Court was unwilling to believe that the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations" was really material in light of the government's inaction when faced with more significant evidence of that affiliation. 364 U.S. at 354-355.

The Court was careful to note that had Chaunt not disclosed his affiliation with the IWO, the "failure to report the arrests would have had greater significance. It could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355. On the facts

before it, however, the Court concluded that the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355.

The lesson of *Chaunt* is that citizenship may not be revoked for concealing facts that, if disclosed, would neither have been grounds for denying citizenship nor have triggered an investigation. Concealed facts are material, said the Court, only if they would have justified denial of citizenship "in and of themselves" or if their disclosure "might have led to the discovery of" disqualifying facts. 364 U.S. at 353. Thus, *Chaunt* describes two independent tests of materiality, and the Court's use of the disjunctive establishes that denaturalization may follow from a concealment of facts that are material under either one of the two tests. *Id.* at 353, 355.

The Court had occasion a few months later to apply the first *Chaunt* test in another denaturalization action. In *Costello* v. *United States*, 365 U.S. 265 (1961), the applicant for naturalization had sworn that his occupation was "real estate," whereas the district court found that his occupation was in fact bootlegging. This Court found that Costello had concealed the fact that he was a bootlegger and that a known bootlegger probably would not have been naturalized. Accordingly, it ruled that the district court correctly determined that Costello "had '[s]uppressed or concealed facts * * * [which] * * * if known, might in and of themselves justify denial of citizenship.' *Chaunt* v. *United States*, *supra*, at 352–353." 365 U.S. at 272. Because the first *Chaunt* test applied, the Court had no occasion to consider materiality under the second *Chaunt* test.

The meaning of the first *Chaunt* test is clear and is not disputed in this case.[14] Concealed facts are material if they would have been grounds for denial of citizenship. There has been some uncertainty, however, over the precise meaning of the second *Chaunt* test. See generally Comment, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471 (1980).

Materiality is shown under the second *Chaunt* test if "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt* v. *United States*, *supra*, 364 U.S. at 355. This formulation, particularly the use of the word "possibly," arguably leaves some ambiguity as to what must be shown as likely to have ensued had the applicant told the truth. There are, we believe, two separate questions to be addressed: (1) the likelihood that an investigation would have been conducted, and (2) if an investigation had been conducted, the likelihood that it would have led to the discovery of facts that would have warranted denial of citizenship. Thus, a possible articulation of the test, in the way most conducive to a finding of materiality, would be that a concealed fact is material if, had it been revealed, an investigation *might* have been conducted that *might* have yielded facts warranting a denial of citizenship. At the other extreme, the narrowest definition of materiality under the second *Chaunt* test would require the government to prove that an investigation *would* have been conducted that *would* have yielded facts warranting a denial of citizenship.

We do not contend that the first articulation of the test suggested above is proper; such a loose reading of the

[14] Its application to the facts of this case, however, is contested (see pages 39–42, *infra*).

statutory requirement of materiality would be an inadequate safeguard of citizenship. On the other hand, the second articulation is too narrow, for it would always require proof of the disqualifying facts themselves and hence would do nothing to discourage fraud. Rather, we submit, the appropriate test under the statute is the intermediate one suggested in *Chaunt* and embraced by the court of appeals—concealed or misrepresented facts are material if their disclosure *would* have led to an investigation that *might* have revealed facts warranting denial of citizenship. Under this test, the government is not required to prove the existence of "ultimate facts"[15] that would have resulted in a denial of citizenship, but it must show that the concealed facts, if revealed, would have prompted an investigation that might have revealed "ultimate facts." This approach strikes the proper balance between two recognized and important interests: (1) the citizen's interest in retaining the "priceless treasure" of citizenship (*Johnson* v. *Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting)) against insubstantial claims of irregularity and (2) the government's interest in obtaining "frank, honest, and unequivocal answers" (*Chaunt* v. *United States*, *supra*, 364 U.S. at 352) on which it must base the solemn decision to extend United States citizenship to an alien.

The court of appeals adopted this view of the materiality requirement, holding that the second *Chaunt* test requires "only that the government prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship" (J.A.

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[15] As did the court of appeals (J.A. 113), we use the phrase "ultimate facts" to refer to facts that, in and of themselves, justify denial of citizenship.

113; see also J.A. 115-116 n.6).[16] The district court, by contrast, construed *Chaunt* to require that the government prove not only that revelation of the true facts would have prompted further investigation, but also the existence of ultimate facts warranting denial of citizenship (J.A. 93-94). Petitioner urges this Court to adopt the district court's view (Br. 13-14), which is essentially equivalent to the second extreme described above.[17] As the court of appeals pointed out (J.A. 113), however, this view is an exceedingly strained interpretation of *Chaunt*. The language of *Chaunt* plainly indicates that the focus of the second test is whether disclosure would have led the government to conduct a relevant investigation, one that "possibly" would have led to facts justifying a denial of

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[16]Thus, petitioner mischaracterizes the court of appeals' holding in stating (Br. 14) that it held that the government need only show that disclosure of the concealed facts *might* have led to an investigation.

[17]The district court nodded toward what we believe to be the correct, if somewhat oversimplified, construction of *Chaunt* in noting that the word "possibly" in the Court's formulation "could be read to modify the entire phrase, thus supporting the Government's interpretation that existence of facts warranting denial of citizenship need only be a possibility" (J.A. 93). But it rejected that reading, concluding that "if this were the intent of the [*Chaunt*] Court, it would have been clearer to state 'facts which might warrant denial'" (*ibid.*). In order to give some effect to the word "possibly," the court concluded that the word modified only the phrase "leading to the discovery of other facts" (J.A. 93-94). Presumably, the district court's formulation of the test therefore would not require the government to prove conclusively that the particular investigation prompted by full disclosure would have uncovered the ultimate facts. This technical distinction from the second extreme described above would be of little practical significance. It is most unlikely that the government, once having proved both that an investigation directed at eligibility would have occurred and the existence of ultimate facts demonstrating lack of eligibility, would be unable to convince a court that the investigation would have revealed those facts.

citizenship (J.A. 113; 364 U.S. at 353, 355). Indeed, the question on which the result in *Chaunt* turned was whether the truth would have prompted an investigation.

Petitioner correctly notes (Br. 13) that the district court's decision makes the government's burden "equally demanding" under both *Chaunt* tests. And petitioner criticizes the court of appeals' decision (Br. 20–21) for holding that denaturalization may be permissible under the second *Chaunt* test in circumstances where the first *Chaunt* test cannot be met. Petitioner thus exposes the profound shortcoming in his argument. Even though *Chaunt* clearly establishes two independent tests for materiality, petitioner and the district court interpret the second test in a manner that adds virtually nothing to the first test.

The crux of the first *Chaunt* test is that the government must prove the existence of a fact that made the defendant ineligible for citizenship. It must, of course, also show the concealment of that fact. Although the government can meet this test in some cases (see *Costello* v. *United States*, *supra*), the burden is a severe one because it is often impossible, particularly many years after citizenship is granted, to prove the existence of a disqualifying fact by clear and convincing evidence. By contrast, the second *Chaunt* test recognizes that a misrepresentation may be material even if it does not concern a matter that is, in and of itself, a ground for denial of citizenship. The focus of the materiality test, of course, must be on the misrepresented fact. Yet the district court's interpretation irrationally focuses on something quite different, requiring the government to prove the existence of a disqualifying fact just as it must under the more rigorous standard of the first test. In the words of the court of appeals (J.A. 113), the district court's interpretation "destroy[s] the utility of the second *Chaunt* test, since it would

require, as does the first *Chaunt* test, that the government prove ultimate facts warranting the denial of citizenship."[18]

b. The weight of authority strongly supports the court of appeals' decision. Prior to *Chaunt*, courts consistently focused on the importance of an investigation in determining an applicant's eligibility for citizenship. Accordingly, misrepresentations were held material whenever they forestalled an investigation relevant to eligibility that would have been conducted had the truth been told. See Comment, *supra*, 48 Fordham L. Rev. at 485–487. See also Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 270–272 (1962) (deportation).

In *Corrado* v. *United States*, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956), for example, the defendant argued that denaturalization was unwarranted because the arrests and misdemeanor convictions that he had concealed were not grounds for denial of citizenship. The court of appeals disagreed, stating (227 F.2d at 784):

> Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. * * * Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.

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[18] Moreover, the consequence of the district court's interpretation is that the materiality of a false statement is not determined as of when it was made. Rather, it depends upon the government's ability to prove a

Corrado was followed in *United States* v. *Montalbano*, 236 F.2d 757, 759–760 (3d Cir.), cert. denied, 352 U.S. 952 (1956), where the court likewise rejected the defendant's claim that his concealed arrest record would not have been grounds for denial of citizenship. See also *United States* v. *Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States* v. *Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956).

Chaunt did not purport to disturb this established rule. Indeed, the language used in *Chaunt*, "possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355), is not significantly different from that used in *Corrado*. The commentators thus have uniformly recognized that *Chaunt* does not require the government to prove ultimate facts if it proves that the truth would have prompted an investigation relevant to eligibility. See Comment, *supra*, 48 Fordham L. Rev. at 491–493; Appleman, *supra*, 22 Fed. B.J. at 271–272; 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.4b, at 20–14 (rev. ed. 1979). In addition, shortly after *Chaunt* was decided, the Attorney General, who is charged with the administration of the Immigration and Nationality Act and whose rulings on questions of law are controlling within the Executive Branch under 8 U.S.C. 1103(a), issued a ruling on materiality in the deportation context. *In re S- and B- C-*, 9 I. & N. Dec. 444 (1961). The Attorney General concluded that the government may satisfy the materiality requirement either by proving ultimate facts or by showing that the misrepresentation "tend[ed] to shut off a line of inquiry

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different fact, which may diminish over time. In this case, for example, no one but petitioner will ever know with certainty, at this late date, the nature of his service as a guard at Treblinka. But if his concealment of that service was material when made, the disappearance of inculpatory evidence with the passage of time should not render it immaterial.

which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Id.* at 447. This test, the Attorney General noted, was consistent with the *Chaunt* test for denaturalization. *Ibid.*[19]

Post-*Chaunt* decisions of the courts of appeals have continued to apply the materiality standard used by the court of appeals in this case. In *United States* v. *Oddo*, 314 F.2d 115 (2d Cir.), cert denied, 375 U.S. 833 (1963), the district court found that the defendant had concealed his arrest record when he applied for naturalization, and it revoked his citizenship. On appeal, the defendant argued that his arrest record would not have been grounds for denial of citizenship, advancing the same construction of *Chaunt* that petitioner urges here. The Second Circuit squarely rejected this construction, holding (314 F.2d at 118):

> Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry which might conceivably lead to collateral information of greater relevance. United States v. Montalbano * * *; Corrado v. United States * * *. As the Court said in Chaunt, "An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry." 364 U.S. at 354, 81 S. Ct. at 150. Oddo denied the Government the opportunity to make that enquiry.

See also *United States* v. *D'Agostino*, 338 F.2d 490 (2d Cir. 1964) (fact that defendant was married when he claimed to be single held material).

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[19] This Court has recently relied on a comparable pronouncement by the Attorney General, construing a citizenship decision this Court had rendered, in determining the reach of that decision. *Vance* v. *Terrazas*, No. 78-1143 (Jan. 15, 1980), slip op. 9.

Two other circuits have also read *Chaunt* not to require proof of ultimate facts. In *Langhammer* v. *Hamilton*, 295 F.2d 642 (1st Cir. 1961), an action by an alien to avoid deportation, the alien argued that his former membership in the Communist Party was "involuntary," and thus his deliberate failure to disclose it on his visa application was not material because disclosure would not have resulted in his exclusion. The court held that this argument was foreclosed by *Chaunt*, stating (295 F.2d at 648):

> In essence [appellant] argues that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. We do not believe this to be the law and, consequently, had we now agreed that appellant's membership was involuntary, such determination would not have operated *nunc pro tunc* to render his omission nonmaterial.

Similarly, in *Kassab* v. *INS*, 364 F.2d 806 (6th Cir. 1966), another deportation case, the court held, citing *Chaunt*, that it was not necessary that "it be shown that petitioner *would not* have procured his visa if the true facts had been known." *Id.* at 807 (emphasis in original).

Against this weight of authority, petitioner contends (Br. 14–17) that the Ninth Circuit's decisions in *United States* v. *Rossi*, 299 F.2d 650 (1962), and *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (1974), support his position. These cases, however, did not involve interpretations of the second *Chaunt* test. In *Rossi*, the defendant, an Italian, applied for a visa in the name of his brother, a Chilean, in order to avoid the Italian immigrant quota. If, in fact, the Italian quota had been oversubscribed, the suppressed facts as to defendant's identity, if known, would have excluded him from entry, and thus the misrepresentation would have been material under the first *Chaunt* test. The court, however, found that the government's evidence did not establish that the Italian quota had been

oversubscribed. This resolved the crucial issue in the case. There was no allegation by the government that, had Rossi revealed his true identity, an investigation would have ensued; the institution of an investigation does not depend upon whether an applicant is Chilean or Italian. Accordingly, the *Rossi* court had no occasion to consider the second *Chaunt* test.[20]

The Ninth Circuit followed *Rossi* in *La Madrid-Peraza*, a deportation case. Again, it considered only the first *Chaunt* test. The defendant had overstated the wages she was to receive in the United States. Because the government did not establish that the wages she actually did receive were below the prevailing rate for similarly situated American workers, which would have been grounds for denying admission, the court held that the misrepresentation was not material. As in *Rossi*, the government did not contend that the defendant's misrepresentation foreclosed an investigation that might have uncovered disqualifying facts; thus, the court had no reason to address the second *Chaunt* test.[21] No court of appeals decision,

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[20] The court rejected the argument that *any* intentional misrepresentation was grounds for denial of citizenship. 299 F.2d at 652. In so doing, the court stated that a fact is material only if "it is one which, if known, would have justified a refusal to issue [a] visa." *Id.* at 652–653. This statement, of course, paraphrases the first *Chaunt* test. In the absence of a contention that the truth would have prompted an investigation, it appears unlikely that the Ninth Circuit intended that statement to encompass the second *Chaunt* test as well.

[21] A recent unpublished decision, *Nagy* v. *United States*, No. 77–4053 (9th Cir. May 13, 1980), indicates that the Ninth Circuit's interpretation of the second *Chaunt* test is in accord with that of the court of appeals here. In upholding a denial of naturalization, the court found that, although disclosure of the applicant's complete arrest record for homosexual offenses would not have been grounds for denial of citizenship, it "might have * * * led to further inquiry * * * [that] might have disclosed other instances of homosexual activity sufficient to preclude a finding of good moral character." Slip op. 3. This showing, the court held, satisfied the materiality standard of *Chaunt*.

therefore, supports petitioner's interpretation of the second *Chaunt* test.[22]

2. *A Requirement that the Government Prove Ultimate Facts in Every Denaturalization Proceeding Would Defeat Congressional Intent*

The court of appeals' interpretation of *Chaunt* is consistent with Congress' intent to discourage fraud in immigration and naturalization proceedings. The United States has naturalized large numbers of persons because of a liberal statutory policy of admitting aliens to citizenship. As a result, the government in such proceedings has relied for the most part on the duty of applicants to make truthful responses to questions it deems significant in determining eligibility for naturalization, rather than undertaking the burdensome task of investigating every application. Truthful answers to such questions are thus essential to the effective functioning of the system. As the Court stated in *Chaunt*, "[f]ull and truthful response to all relevant questions required by the naturalization procedure is * * * to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest,

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[22] Petitioner cites two other cases in support of his position. In *United States* v. *Riela*, 337 F.2d 986 (3d Cir. 1964), the government proved that the defendant concealed the fact that he had entered the United States illegally. This misrepresentation was clearly material under the first *Chaunt* test, and the court did not purport to consider the second test. In *United States* v. *D'Agostino*, *supra*, the defendant "raise[d] no issue with respect to the materiality of" his misrepresentation. 338 F.2d at 491. As petitioner notes (Br. 16), the court quoted from *Chaunt* in finding that petitioner's concealment of his marital status was material because its disclosure "might have led to the discovery of other facts which would justify denial of citizenship." *Ibid.* *D'Agostino* strongly supports the court of appeals' interpretation in this case because, needless to say, being married is not, in and of itself, a reason for denying citizenship. The misrepresentation was material only because the truth might have led to the discovery of other facts warranting denial.

and unequivocal answers to the court when one seeks naturalization is a serious matter." 364 U.S. at 352.

Congress has clearly manifested its desire to discourage false representations by applicants for immigration and naturalization. The fraud portion of 8 U.S.C. 1451(a) was amended to its present form in order to make clear that false swearing before a naturalization officer is a ground for denaturalization. S. Rep. No. 1515, 81st Cong., 2d Sess. 756–769 (1950). Other statutory provisions also reflect this policy. For example, any alien who seeks to enter the United States by fraud is ineligible for admission. 8 U.S.C. 1182(a)(19). In amending this section in 1952, Congress emphasized that "every effort is to be made to prevent the evasion of law by fraud." H.R. Conf. Rep. No. 2096, 82d Cong., 2d Sess. 128 (1952).[23] Moreover, Section 10 of the Displaced Persons Act itself provided that persons who made misrepresentations for the purpose of gaining admission to the United States as displaced persons would thereafter be ineligible for admission. 62 Stat. 1013. The "materiality" requirement urged by petitioner flies in the face of this strong policy. Indeed, not only would petitioner's interpretation of the materiality requirement of 8 U.S.C. 1451(a) not discourage misrepresentations, it would actually *invite* persons seeking to immigrate or become naturalized to conceal the truth.

Requiring the government in every denaturalization case to prove the existence of ultimate facts that, in and of themselves, warrant denial of citizenship can only encourage an applicant to lie about his background, thereby forestalling an investigation that might reveal those ulti-

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[23] See also 18 U.S.C. 1015(a) (criminal offense to make false statement in a naturalization proceeding); 8 U.S.C. 1325 (criminal offense for alien to enter United States through misrepresentation); 8 U.S.C. 1101(f)(6) (person who gives false testimony to obtain immigration or naturalization benefits is not of good moral character).

mate facts at a time when the applicant has the burden of proving eligibility. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636–637 (1967).[24] In many cases, the lie will never be discovered and the applicant will retain his fraudulently obtained citizenship without a challenge. But even if his deception is eventually bared, the applicant is better off for having lied because the passage of time no doubt will have made it more difficult for the government to uncover the disqualifying facts—and the burden of proving ineligibility, by clear and convincing evidence, will have shifted to the government. See *Schneiderman* v. *United States*, *supra*, 320 U.S. at 125, 158.

As the court of appeals remarked, "an applicant with something to hide would have everything to gain and nothing to lose by lying under oath" (J.A. 114). The worst that could happen is that (a) his deception would later be discovered, (b) the government would then investigate and be able to turn up disqualifying facts, and (c) the government would then be able to prove those facts in a denaturalization trial by clear and convincing evidence. If the government cannot meet all three requirements (and each one poses separate and difficult problems that are exacerbated by the passage of time), the applicant is rewarded for his deception. See *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir. 1960). And if the government does succeed on all three scores, the defendant is no worse off than he would have been had he told the truth at the outset. He is, in fact, better off because he has enjoyed the benefits of citizenship for some length of time. Surely Congress cannot have intended this incentive to misrepresent the truth,

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[24] Section 10 of the Displaced Persons Act, under which petitioner was admitted, provided that "[t]he burden of proof shall be upon the person who seeks to establish his eligibility under this Act." 62 Stat. 1013.

and this Court should not countenance such a perverse interpretation of the law.

This case presents a prime example of what would result from such an ill-advised interpretation. The heart of petitioner's defense, both at trial and before this Court, is that his service at Treblinka was involuntary and that he committed no atrocities there. Setting the contrary evidence aside for the moment (see pages 6-7, *supra*), let us assume *arguendo* that an applicant could conceivably have established the involuntary nature of his concentration camp guard service and that such a showing would have made him eligible for a visa. By refusing to reveal that he had been a concentration camp guard at all, petitioner unquestionably prevented the government from conducting an investigation into the facts and circumstances of his Treblinka service. Certainly, at least a possibility existed that such an investigation would have proven that petitioner's service was voluntary or that he committed atrocities. Even the district court recognized both that, had petitioner revealed the truth, an investigation would have been conducted and that voluntary service or committing atrocities would have disqualified petitioner from entering the United States (J.A. 93). Thus, petitioner can prevail in this action only if it is assumed that the investigation, which petitioner himself prevented, would have exonerated him.[25] This position is untenable. Its adoption

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[25] If petitioner is in fact innocent of the charges, he may be able to prove that the investigation would have exonerated him. In that case, he would not be subject to denaturalization under the court of appeals' interpretation because he would have rebutted a necessary element of the government's proof—that the investigation might have led to disqualifying facts. The fact that the burden of making this showing is placed on petitioner is quite appropriate. It merely restores the burden of proof that petitioner bore when he applied for admission to the United States and for naturalization, a burden that he never satisfied, except by deceit.

would convert the solemn requirement of truthful and candid answers into a sham.

As the court of appeals stated, petitioner's "assertion before the district court that his guard service was involuntary comes thirty years too late" (J.A. 117). Neither a district court nor this Court can sit as an investigating commission to determine if petitioner's service at Treblinka in 1943 was voluntary or compelled. That inquiry (continuing our assumption *arguendo* that the issue was relevant at the time of petitioner's application for admission) ought to have been conducted in 1949 by the Displaced Persons Commission and the immigration authorities, for they had the responsibility, the resources and the expertise to do it, and the evidence on the matter was relatively accessible to them. The reason such an inquiry was not undertaken was that petitioner lied. Petitioner's deception has now been revealed, and he asks the courts to rule that his Treblinka service was in fact innocent. This Court should reject the contention that the government is now bound to prove the voluntariness of petitioner's Nazi service by clear and convincing evidence, when he intentionally concealed the facts that would have prompted an inquiry on that very issue 30 years ago.

Furthermore, petitioner's position not only imputes to Congress an irrational intent to establish an incentive to lie, but also makes a portion of the denaturalization statute redundant, contrary to the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). 8 U.S.C. 1451 (a) establishes two separate grounds for denaturalization: (1) illegal procurement or (2) willful concealment or misrepresentation of a material fact. Yet adoption of petitioner's

interpretation would make the fraud provision superfluous; the government would be required to establish illegal procurement as a prerequisite to establishing procurement by a material misrepresentation.

As noted above (see page 17, *supra*), citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization is] granted." H.R. Rep. No. 1086, *supra*, at 39. But to establish ultimate facts warranting denial of citizenship, as petitioner's materiality definition requires, the government must prove precisely that the individual lacked some statutory requirement for naturalization. Thus, the procurement of citizenship through a material misrepresentation would, by definition, constitute illegal procurement. If, in order to establish a material misrepresentation, the government must first make a showing that is sufficient to prove illegal procurement, the misrepresentation provision would lose all significance. Put another way, petitioner's interpretation gives no effect to Congress' manifest intent to permit denaturalization for material misrepresentations in naturalization proceedings. See *Costello* v. *United States*, *supra*, 365 U.S. at 271–272 n.3; S. Rep. No. 1515, 81st Cong., 2d Sess. 756, 769 (1950). If persons may be denaturalized only when it is shown that they were ineligible for citizenship in the first place, their fraudulent behavior itself, no matter how egregious, is of no significance for citizenship purposes.

Materiality of a false statement is not a concept unique to immigration law. Congress' failure to provide any definition of "material" in 8 U.S.C. 1451(a) suggests that the word should be given its ordinary statutory meaning. Numerous criminal statutes contain materiality standards, notably the perjury statutes, 18 U.S.C. 1621 (false statement as to a "material matter") and 18 U.S.C. 1623 (false

"material declaration" before a court or grand jury), and the false statement statute, 18 U.S.C. 1001 (concealment of a "material fact" in a matter within the jurisdiction of a department or agency of the United States). Because these statutes provide criminal sanctions, their definition of "material" should, if anything, be narrower than that in the immigration field. Yet the materiality standard for these criminal offenses is significantly broader than the standard that petitioner advances as the proper one under 8 U.S.C. 1451 (a).

The standard of materiality under 18 U.S.C. 1623 and 18 U.S.C. 1621 is the same. *United States* v. *Lardieri*, 497 F.2d 317, 319 (3d Cir. 1974). Because of its investigatory purpose, the grand jury is perhaps most closely analogous to the citizenship investigation involved here. A false statement before the grand jury is material if it "would have the natural effect or tendency to influence, impede, or dissuade the Grand Jury from pursuing its investigation. * * * The false statements need not actually impede the investigation." *United States* v. *Gremillion*, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). See also *United States* v. *Di Fonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979) (similar standard under 18 U.S.C. 1001). Moreover, "leads to additional facts may be material even though they do not directly reflect on the ultimate issue being investigated." *United States* v. *Lardieri*, *supra*, 497 F.2d at 319. See also, *e.g.*, *United States* v. *Berardi*, No. 79-1434 (2d Cir. June 19, 1980), slip op. 3667-3669; *United States* v. *Tyrone*, 451 F.2d 16 (9th Cir. 1971), cert. denied, 405 U.S. 1075 (1972).

In the grand jury context, then, the focus of the materiality test is the effect that the false statement has on the grand jury's *investigation*; it is irrelevant whether it would have affected that body's ultimate determination. There is no reason to imply a congressional intent to make

the materiality standard under 8 U.S.C. 1451(a) more stringent than that under these criminal statutes. Indeed, because false statements under oath in naturalization proceedings constitute a criminal offense under 18 U.S.C. 1015(a),[26] petitioner's position leads to the absurd result that a person who procures his citizenship by a misrepresentation would be immune from the civil consequence of denaturalization unless "ultimate facts" can be proven, yet would be subject to criminal penalties, including imprisonment, for the very same misrepresentation.

B. Petitioner Willfully Misrepresented A Material Fact In Concealing His Service At Treblinka

It is undisputed that petitioner concealed the fact of his service at Treblinka. He testified at length about his experience there (J.A. 40–51; R. 1297–1341). He also admitted that he falsified his whereabouts during the war when he sought a visa to enter the United States (J.A. 51–54). At no time prior to this litigation did petitioner tell the truth about the three years of his life between 1942 and 1945. At trial, petitioner admitted that he gave this false information "willingly" (J.A. 52). We submit that these misrepresentations were "material" within the meaning of 8 U.S.C. 1451(a) and that the court of appeals was correct

[26]The standard of proof under this statute is essentially the same as for perjury. *Bridges* v. *United States*, 346 U.S. 209, 222 (1953). Accordingly, a materiality requirement analogous to that for perjury has been applied, although the statute on its face does not require materiality. See *United States* v. *Laut*, 17 F.R.D. 31, 34 (S.D.N.Y. 1955). The making of false statements to an immigration or naturalization officer would appear to be criminal under both the general perjury statute and the false statement statute as well. See 2, 3 C. Gordon & H. Rosenfield, *supra*, at §§ 9.35, 9.36, 21.5; *Tzantarmas* v. *United States*, 402 F.2d 163, 168 (9th Cir. 1968), cert. denied, 394 U.S. 966 (1969); *United States* v. *Flores-Rodriguez*, 237 F.2d 405, 408 (2d Cir. 1956).

in ordering petitioner's certificate of naturalization cancelled.

1. *Petitioner's Misrepresentation was Material Under the First Chaunt Test*

The reason that petitioner lied to the authorities in 1949 is apparent. Kempton Jenkins' testimony clearly establishes that, had petitioner told the truth, he would have been denied a visa.[27] Jenkins testified that, in his expert opinion, an applicant who had served as a concentration camp guard was ineligible for a displaced person visa (J.A. 38–39). He further testified that such was the "universal interpretation" of the Act by the vice-consuls who administered it (R. 768) and that he was "reasonably certain" that no concentration camp guard was ever legally qualified as a displaced person (J.A. 39).[28]

The legal basis for this determination was clear. Under the IRO Constitution, as incorporated into Section 2(b) of the Displaced Persons Act, ch. 647, 62 Stat. 1009, persons who "assisted the enemy in persecuting civil populations"

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[27] Petitioner testified (J.A. 52) that he lied because he did not want to go back to the Soviet Union. In fact, there was no realistic possibility in 1949 that he would have been repatriated to the Soviet Union. In any case, this claim does not excuse the lie; indeed, it reveals that petitioner understood that disclosing the truth would have prevented him from entering the United States. As the court of appeals stated, "the immigration law does not allow a defense that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth" (J.A. 118).

[28] As the district court noted (J.A. 95), the decision of the vice-consuls whether to issue a visa was, for all practical purposes, final. In theory, the vice-consul's decision could be overridden by the Consul General, but Jenkins knew of no such occurrence and there was no evidence that it ever happened (see R. 721–722). Thus, the vice-consuls' interpretation of the Act, which followed three months of training in its proper application by State Department officials (R. 720–721), was authoritative. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

or who "voluntarily assisted the enemy forces" were not considered eligible displaced persons.[29] The conclusion that concentration camp guards had "assisted the enemy in persecuting civil populations" was not arrived at lightly or in ignorance of the facts. Jenkins testified that concentration camp guards were "feared, hated, despised" because "they participated in brutalizing and dehumanizing the inmates regularly" (R. 758). In Jenkins' experience, there were no instances of friendly guards in concentration camps; in fact, only the most trusted auxiliaries were assigned to be guards in such camps (R. 759–760).

Jenkins also testified that he knew of no case where a camp guard attempted to convince officials that his service was involuntary (R. 760, 787–788, 807).[30] When former concentration camp guards who attempted to conceal their past were identified and confronted, they were given "full opportunity to describe to [the vice-consuls] the entire range of their motivations, involvement, and so forth" (R. 806). Jenkins testified that these guards "admitted that they had chosen to be a concentration camp guard rather than go into the labor division because living was

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[29]Jenkins did testify that applicants whose service in Axis labor battalions or military units was truly involuntary were eligible for visas (R. 748–751, 760, 784–787, 799, 819). Jenkins was asked by the court why a concentration camp guard who served involuntarily (assuming that was possible) should have been ineligible for a visa. He replied that "the crime against humanity that is involved in the concentration camp [service] puts it into a different category" (R. 823). This difference is highlighted by the omission of the word "voluntary" from the clause of the IRO Constitution that excludes persecutors of civilians. 62 Stat. 3051–3052.

[30]Jenkins' testimony on this subject is entitled to considerable deference, not only because of his first-hand experience in administering the Displaced Persons Act, but also because the practice of the Act's administrators was to circulate among the other vice-consuls the case file of any applicant shown to have been a camp guard (R. 826). Thus, Jenkins and the other vice-consuls were particularly well informed of the facts and circumstances surrounding the eligibility of former camp guards under the Act.

better, food was better * * *. Nobody claimed involuntary, in fact. They had lots of tortured explanations as to why, but nobody said 'I was forced to be a camp guard'" (R. 807). It seems apparent that former camp guards knew—in 1949—that a defense of involuntary service would have been incredible on its face.

Jenkins' testimony on all these points was uncontroverted. His credentials as an expert on the operation and administration of the Displaced Persons Act were established, and his status as an expert was not objected to by petitioner (J.A. 37–38). His testimony clearly establishes on this record that had petitioner disclosed, in 1949, the fact of his service at Treblinka he would have been denied a visa under the Act. Accordingly, the evidence in this case demonstrates that petitioner concealed a fact material under the first *Chaunt* test—a fact that, in and of itself, would have resulted in the denial of a visa and citizenship to petitioner. The district court's conclusion, based upon no evidence in the record and in total disregard of Jenkins' testimony,[31] that petitioner would have

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[31] The district court stated that there were "a number of inaccuracies" in Jenkins' testimony and that therefore his testimony must be considered "in the light of all the evidence" (J.A. 86). These asserted inaccuracies concerned peripheral remarks that Jenkins made about such matters as the color of the guards' uniforms during the war, their insignia, and their leave privileges (J.A. 87). Jenkins, of course, was offered as an expert not on the details of the concentration camps but on the operation and administration of the Displaced Persons Act, about which he had extensive first-hand experience. He testified on cross-examination that his opinion that there were no involuntary concentration camp guards was based on experience "in the field" (R. 788).

The district court alleged only one "discrepancy" in Jenkins' testimony in his area of expertise. According to the court, Jenkins testified that the "kapos"—Jewish supervisors in the camps—were excludable under the Displaced Persons Act, while the survivors who testified at trial defended the actions of the kapos as humane and mild (J.A. 87–89). Even if Jenkins did so testify, this is no "discrepancy"—

been admitted to the United States in 1949 because his service was involuntary is clearly erroneous.[32]

2. *The District Court's Findings Establish that Petitioner's Misrepresentation Was Material Under the Second Chaunt Test*

The district court specifically found that if petitioner had disclosed his service at Treblinka, "it certainly would have prompted an investigation by the Vice-Consul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission" (J.A. 93). Accordingly, as the court of appeals found (J.A. 117), the government clearly and convincingly proved that defendant's misrepresentation was material under the second *Chaunt* test.[33]

Petitioner, however, attempts to analogize this case to *Chaunt*, contending (Br. 18) that disclosure of petitioner's Treblinka service would not have triggered an investigation because his disclosure that he had been at Poelitz did

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the survivors testified to what the kapos did in the camps, while Jenkins testified to what their status was under the Act. In fact, Jenkins noted that it was "a very difficult thing to determine" whether the evidence in cases of particular inmates justified a determination of collaboration (R. 828). Furthermore, Jenkins testified that he did not know of any specific case in which a "kapo" was denied a visa and had not personally handled any applications from kapos (R. 829).

[32] Because it held petitioner's misrepresentation to be material under the second *Chaunt* test, the court of appeals did not reach the question whether the evidence demonstrated materiality under the first test as well. If this Court disagrees with the court of appeals on the interpretation of the second test, it should either remand to the court of appeals for consideration of the applicability of the first *Chaunt* test or affirm the judgment on the ground that the first test has been satisfied. See, *e.g.*, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951).

[33] In this regard, the court of appeals did not overlook the district court's findings, as petitioner asserts (Br. 19), but in fact adopted them.

not trigger an investigation. This analogy is without substance. First, petitioner stated only that he was a forced laborer at Poelitz; he did not reveal that he had been a guard (J.A. 83, 85). But more important, petitioner ignores the fundamental difference between Poelitz and Treblinka. Poelitz was merely a city that contained many foreign laborers. There is no evidence that atrocities were committed at Poelitz and there was nothing unusual in petitioner's statement that he was employed there.[34] Treblinka, on the other hand, was a notorious extermination camp at which approximately 800,000 people were murdered. What occurred as a result of petitioner's statement that he was a laborer at Poelitz is no indication of what would have happened if he had disclosed his service as a guard at Treblinka.[35] The district court's finding that an investigation would have ensued, had petitioner told the truth, is unassailable.[36]

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[34] By 1944, more than 7 million foreign laborers were working in Germany. E. Homze, *Foreign Labor in Nazi Germany* 233 (1967).

[35] Whatever effect the disclosure of petitioner's Poelitz service could conceivably have had (the district court asserted that it would have triggered a "search of the records" (J.A. 93)), it certainly could not have suggested that an investigation be undertaken into whether petitioner committed atrocities at Treblinka, where the immigration authorities had no reason to suspect petitioner had ever been.

[36] Petitioner also objects (Br. 7, 17) that Vice-Consul Ralph Clark, who approved petitioner's visa, did not testify as to what he personally would have done had petitioner told the truth in 1949. We are informed that prosecuting attorneys sought the aid of the State Department in locating Clark but were told that the available records contained no information on his current whereabouts. (This fact, we note, illustrates the burden placed on the government in being forced to demonstrate what would have happened 30 years ago). Petitioner offered no objection at trial when Jenkins was proffered as an expert witness, and the Court should not permit him now to indulge in pure speculation that Clark might have testified that he would not have ordered an investigation.

II. THE DISTRICT COURT HAD NO EQUITABLE POWER TO REFUSE TO REVOKE PETITIONER'S CITIZENSHIP

The district court advanced an alternative ground for refusing to revoke petitioner's citizenship. Noting that "[t]his denaturalization proceeding is a suit in equity, * * * and equity demands the weighing of the rights of the parties in light of all the circumstances in order to arrive at a decision which is fair and just" (J.A. 98), the court concluded that, even if his misrepresentation was material, "the equities should be weighed in favor of [petitioner]" (J.A. 103). The court of appeals correctly held that the district court exceeded its authority in asserting this power.

The district court recognized that its theory was unprecedented (J.A. 100), but found authority for this power in the fact that "lower courts have exercised discretion in determining whether citizenship should be *granted*" (*ibid.*; emphasis added). As the court of appeals recognized, however, discretion to decide whether citizenship should be granted is one thing; an asserted "discretion" to excuse illegal or fraudulent procurement of citizenship is quite another. District courts necessarily and properly exercise discretion in determining whether an individual meets the requirements for naturalization, such as good moral character. "Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship" (J.A. 119). See *United States* v. *Ness*, 245 U.S. 319, 324 (1917). By the same token, once a district court determines that a citizen obtained his citizenship illegally or through fraud, it has no discretion to excuse the conduct. As this Court stated in *United States* v. *Ginsberg*, *supra*, 243 U.S. at 474–475:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.
>
> * * * * *
>
> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it * * * and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential.

Even assuming *arguendo* that a district court has the power in some circumstances to refuse to denaturalize someone because of equitable considerations, invocation of such a power in this case was plainly an abuse of discretion. Although the district court found that the government did not carry its heavy burden of proof, substantial evidence was introduced at trial that indicated that petitioner committed murder and other atrocities at Treblinka (see pages 8–9, *supra*). Moreover, it is undisputed that petitioner shot in the direction of escaping prisoners (J.A. 42, 50–51, 54) and misrepresented his whereabouts and activities during the war (J.A. 51–54). Against this background, no corresponding equities are put forth in petitioner's favor.[37]

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[37] Certainly petitioner has no claim of laches. In *Costello* v. *United States*, *supra*, a denaturalization suit was filed 30 years after citizenship had been granted, but the Court rejected the defendant's laches defense. The seven-year delay here is due solely to petitioner's misrepresentations and, as in *Costello*, it has worked to petitioner's benefit, not to his detriment. See 365 U.S. at 282.

The district court found that petitioner's record as a law-abiding resident in the United States was sufficient reason to permit him to retain his citizenship (J.A. 103).[38] This approach is unacceptable. Obedience to the law is the *minimum* expected of everyone, citizen and alien alike. A mere record of law-abiding conduct or productive labor in this country cannot serve as a basis for excusing the deception that enabled petitioner to enjoy such a life, much less erase the memory of petitioner's unspeakable misconduct during the war years. In short, there are no equitable considerations whatsoever that could distinguish petitioner's case from that of any other citizen who fraudulently obtains citizenship. The district court's interpretation of "equities" would assure aliens that they are welcome to enter the United States illegally and obtain their citizenship by fraud so long as they do not lead a life of crime once they arrive here. This view makes a mockery of our immigration and naturalization laws.

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[38] Petitioner's record as a United States resident is not completely unblemished, of course: he concealed his Treblinka service in his 1970 naturalization examination.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-5602

FEODOR FEDORENKO, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

OBJECTION OF FEODOR FEDORENKO, PETITIONER, TO MOTION OF THE AMERICAN JEWISH CONGRESS, ON BEHALF OF ITSELF, AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Petitioner objects to the above captioned Motion on the following grounds:

1. The American Jewish Congress sought permission for filing of its Amicus Curiae Brief by mailing an undated letter to Petitioner's co-counsel, Gregg Pomeroy, a resident of Florida. This does not constitute a sufficient request for permission under Rule 36 (formerly Rule 42), as Petitioner's co-counsel, Brian M. Gildea, of New Haven, Connecticut, never received said request directly from the American Jewish Congress. In addition, such request does not state an adequate reason for consent.

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2. The request for filing of an Amicus Curiae Brief by the American Jewish Congress, which was sent to Mr. Pomeroy, did not contain a request for permission to include the name of the National Jewish Community Relations Advisory Council. However, when said Motion and Amicus Curiae Brief were filed by the American Jewish Congress, said National Jewish Community Relations Advisory Council was included on the Motion. Permission to include the National Jewish Community Relations Advisory Council was, therefore, never requested, pursuant to the provisions of Rule 36 (formerly Rule 42).

3. All facts and qu-stions relevant to the fundamental issues of this action have been adequately presented to the Court by the parties.

4. The interest of the American Jewish Congress and the National Jewish Community Relations Advisory Council, as disclosed in the Motion, is no more than a remote interest in the issues actually involved in this litigation.

5. The issues which the American Jewish Congress and the National Jewish Community Relations Advisory Council seek to discuss in the Amicus Curiae Brief are, at most, issues collateral to the issues actually involved in this proceeding.

6. The Motion and Amicus Curiae Brief submitted by the American Jewish Congress, on behalf of itself, and the National Jewish Community Relations Advisory Council contain sensitive and superfluous facts which are designed to affect and inflame the reader on issues which are not before this Court.

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In their Motion for Leave to File Amicus Curiae Brief, the American Jewish Congress states on page ii: "..."In the years following World War I, as Jews across the European Continent found themselves once again the hapless victims of national frustrations ard as virulent anti-Semitism, notably in the form of Nazism, ...".

The words contained in the above-quoted passage are designed to purposely upset the reader. This places an additional, unnecessary, and unfair burden on this Court in a case which has already been frought with emotion from its inception.

A rendition of modern history, and the tragedies which have befallen certain of its participants, is superfluous, and serves no purpose in the case before this Court. A multitude of such facts and witnesses thereto were presented at the loser Court trial in which the District Court for the Southern District of Florida found for the Petitioner. Such facts, therefore, having already been presented in the District Court, are redundant, and have no standing before this Court. Furthermore, such facts do not form the basis for this appeal.

So that the Court will understand that Petitioner is not seeking to eliminate from these proceedings an Amicus Curiae Brief, which would be an unbiased discussion of the applicable law involved in this case, the following paragraphs, contained on pages 17 and 18 of the Amicus Curiae Brief, are respectfully reprinted herein.

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"Murder was reduced to a science at Treblinka. The victims arrived in cattle cars, chiefly from the Polish ghettos, but from other countries in occupied Europe as well. Drive from the cars, the men were separated from the women and children; all were forced to undress and hand over their valuables. The victims were then driven either to the lazaret or to the gas chambers, which were disguised as shower rooms. 455 F. Supp. at 901 n. 12. Urged on by comments such as "the water is getting cold," the victims entered a narrow path variously known as the "tube,", "Ascension Boulevard," (Himmelfahrtsallee) or "the road without return," id.; ENCYCLOPEDIA JUDAICA, supra.

> With hands raised above their heads, the victims were driven with canes and whips through the "tube" and into the gas chambers; the capacity of the chambers was utilized to the fullest. After the doors were closed, the order to start the motor was given by calling "Ivan, water!" - Ukrainians ran the motor. The gassing took 30 to 40 minutes, then the doors were opened and the removal of the bodies began.[8]"

Such language is not relevant to the issues before this Court, and does not present an Amicus Curiae, as that term is generally intended. The Petitioner's and Respondent's sole purpose in this action is to have the Court rule upon questions relative to the denaturalization of an American citizen, not to review facts pertaining to atrocities committed by a sick society during the dark days of World War II.

"8. Ino Arndt and Wolfgand Scheffler, "Organisierter Massenmord an Juden in nationalsozialistichen Vernichtung-slagern," in Vierteljahrshefte fur Zeitgeschichte 24, 277-78 (1976); ENCYCLOPEDIA JUDAICA, supra, at 1368-69."

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion of the American Jewish Congress, on behalf of itself, and the National Jewish Community Relations Advisory Council, for Leave to File an Amicus Curiae Brief should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

This is to certify that the original and twelve copies of the foregoing Objection were mailed, postage prepaid, this 13th day of August, 1980 to Michael J. Rodak, Jr., Clerk of the United States Supreme Court, Washington, D. C. 20025.

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October Term, 1980

No. 79-5602

FEODOR FEDORENKO, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

OBJECTION OF PETITIONER, FEODOR FEDORENKO, TO MOTION OF THE ANTI-DEFEMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH COMMITTEE, AMERICAN FEDERATION OF JEWISH FIGHTERS, CAMP INMATES AND NAZI VICTIMS, INC., AND NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Petitioner, Feodor Fedorenko, objects to the Motion of the Anti-Defamation League of B'nai B'rith, American Jewish Committee, American Federation of Jewish Fighters, Camp Inmates and Nazi Victims, Inc., and the National Jewish Community Relations Advisory Council (hereinafter collectively known as and referred to as Anti-Defamation League, et al) for Leave to File a Brief Amicus Curiae on the following grounds:

1. The movant failed to state an adequate reason for consent of the Petitioner to file its Brief.

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2. All facts and questions relative to the fundamental issues of this action have been adequately presented to the Court by the parties.

3. The interest of the Anti-Defamation League, et al, as disclosed in their Motion, are no more than remote interests in the issues actually involved in this litigation.

4. The issues which the Anti-Defamation League, et al seek to discuss in their Brief Amicus Curiae are, at most, issues collateral to the issues actually involved in this proceeding.

5. The Motion and Amicus Curiae Brief submitted by the Anti-Defamation League, et al contain sensitive and superfluous facts which are designed to affect and inflame the reader on issues which are not before this Court.

In their Motion for Leave to File Brief Amicus Curiae, the Anti-Defamation League, et al state on page ii: "The American Federation of Jewish Fighters, Camp Inmates and Nazi Victims, Inc. is a roof organization, encompassing other survivor groups and organizations. It was organized ten years ago fro the purpose of perpetuating the memory of the Jewish people who perished in the Holocaust at the hands of the Nazis.".

The words contained in the above-quoted passage are similar to the words and language of the Brief Amicus Curiae of the American Jewish Congress, which is also objected to. They are designed to elicit strong emotional feelings from the reader on a highly sensitive subject matter, which is not an issue before this Court.

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As stated in Petitioner's objection to the American Jewish Congress' Motion for Leave to File Amicus Curiae Brief, such facts are unnecessary, and have already been discussed and developed at length during the lower Court's proceedings. They do not bear a re-introduction to the Court at this time. Furthermore, such facts do not form the basis for this appeal.

So that the Court will understand that Petitioner is not seeking to eliminate from these proceedings another Amicus Curiae Brief, which would be a helpful discussion of the Federal law involved in this case, the following paragraphs contained on page 4 of the Brief Amicus Curiae of the Anti-Defamation League, et al are respectfully reprinted below:

> "The Treblinka concentration camp, where Fedorenko served, was perhaps the most efficient cog in the Nazi's murder machine. At Treblinka alone more than one million people were sent to the gas chambers. Treblinka was cold calculated genocide; its sole purpose was death. No survivors were intended.
>
> Treblinka was exclusively a camp for Jews. It was part of "Einsatz Operation Reinhard," named for Reinhard Heydrich, the mastermind of the "Final Solution" for the Jewish people. Mechanically, efficiently, Jews were herded to Treblinka, six thousand a day beginning July 23, 1942. A party was held to celebrate the one-millionth arrival. During the year Fedorenko served as a guard at Treblinka, three quarters of a million Jews were killed."

Such language is not relevant to the issues before this Court, and does not present an Amicus Curiae, as that term is generally intended. The Petitioner's and Respondent's sole purpose in this action is to have the Court rule upon questions relative to the denaturalization of an American citizen, and not

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to review facts pertaining to atrocities committed by a sick society during the dary days of World War II, as expounded upon by the Amici.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion for Leave to File Brief Amicus Curiae of the Anti-Defamation League, et al should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

This is to certify that the original and twelve copies of the foregoing Objection were mailed, postage prepaid, this 13th day of August, 1980 to Michael J. Rodak, Jr., Clerk of the United States Supreme Court, Washington, D. C. 20025.

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IN THE

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October Term, 1979

No.. 79-5602

FEODOR FEDORENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-5602

FEODOR FEDORENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for the American Jewish Congress, and the National Jewish Community Relations Advisory Council respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of respondent's assertion that the court below properly revoked petitioner's citizenship. Pursuant to Rule 42, the parties' consent to the filing of the attached brief was sought. The Solicitor General, on behalf of respondent, assented, but Brian M. Gildea, Esq., petitioner's attorney, refused to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans.

The National Jewish Community Relations Advisory Council (NJCRAC) is a coordinating body comprised of eleven national lay Jewish organizations* concerned with American Jewish Community relations and 108 local Jewish Community Councils, including all the major cities in the United States. One of the important goals of NJCRAC is the prosecution of denaturalization cases against alleged Nazi war criminals.

The American Jewish Congress has a long history of combating anti-Semitism both in the United States and abroad. In the years following World War I, as Jews across the European Continent found themselves once again the hapless victims of national frustrations and as virulent anti-Semitism, notably in the form of Nazism, mounted, it began actively to meet the threat which anti-Semitism posed to the Jewish people and world civilization. During and since World War II, the American Jewish Congress and N.J.C.R.A.C. have sought to have world governments bring to justice those responsible for the heinous crimes of the Nazi regime. They have particularly emphasized the need for the Department of Justice to insure that Nazi war

* These organizations are: American Jewish Committee, American Jewish Congress, B'nai Brith—Anti-Defamation League, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's American ORT.

criminals not find a haven in this country. That Department has instituted a series of lawsuits, of which this is one, designed to deprive Nazi war criminals of American citizenship. A reversal of the decision below would place insurmountable obstacles in the way of that effort. Because the American Jewish Congress and NJCRAC believe that such a result would be intolerable, they seek leave to file this brief.

Respectfully submitted,

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BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*

Questions Presented

1. Whether petitioner's failure to disclose, in obtaining a visa in 1949, that he had been an armed guard at the Treblinka concentration camp during the Nazi occupation of Poland was a material misrepresentation of fact under 8 U.S.C. § 1451(a).

2. Whether a District Court possesses discretion to excuse a material misrepresentation of fact and to allow a person who procured his naturalization by fraud to retain United States citizenship.

Decisions Below

The opinion of the District Court is reported at 455 F. Supp. 893 (S.D. Fla. 1978). The decision of the United States Court of Appeals for the Fifth Circuit is reported at 597 F.2d 946 (5th Cir. 1979).

Jurisdiction

The judgment of the Court of Appeals was entered on June 28, 1979, and a petition for rehearing was denied on August 15, 1979. Certiorari was granted on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Summary of Argument

I. The court below correctly interpreted the second branch of the test established in *Chaunt* v. *United States,* 364 U.S. 350 (1960), as requiring a showing that the petitioner had suppressed facts which might have led to the discovery of facts warranting exclusion. This conclusion is supported by the language and facts of *Chaunt* and the decisions of the lower courts applying that decision. Moreover, the decision below is the only one consistent with the policies embodied in 8 U.S.C. § 1451(a). Any other result would penalize the government for petitioner's misconduct and would make it altogether too difficult for the government to denaturalize a person who had obtained citizenship by concealing material information.

II. The Court of Appeals correctly concluded that the District Court lacked discretion to balance the equities as between the government and petitioner. The statute confers no such authority and the decisions of this Court make clear that none exists. In any event, the District Court erred in its balancing of the equities in this case, for, in concluding that those equities favored petitioner, it in effect concluded that by obeying the law in this country, petitioner had washed his hands of the blood of the victims of Treblinka.

Statutory Provisions Involved

The Immigration and Nationality Act, Section 340(a), 8 U.S.C. § 1451(a), provides:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court . . . for the purpose of revoking and setting aside the order admitting such persons to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such cancelling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively; . . . .

The Constitution of the International Refugee Organization of the United Nations, 62 Stat. 3037, T.I.A.S. 1864 (1946), Annex I, Part II, provides that the following persons would not be considered displaced persons:

1. War Criminals, quislings, and traitors.

2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations . . . .

The Displaced Persons Act, 62 Stat. 1009, § 2(b), Chapter 647 (1948), provides that

"Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

Statement of the Case

This case began in August, 1977 when the United States Attorney for the Southern District of Florida filed an action under 8 U.S.C. § 1451(a) to strip petitioner of his American citizenship. Petitioner was admitted to the United States in 1950, under the Displaced Persons Act (DPA), which provided that persons who had assisted the Nazi regime in the persecution of civilians, or who had voluntarily assisted the enemy forces, were ineligible for admission, *U.S.* v. *Federenko,* 455 F. Supp. 893, 897 (S.D. Fla. 1978).

The government's case against the petitioner had three distinct claims, stated in seven counts in the complaint. Proof of any one of these elements would have sustained the government's case. These claims were (1) actual commission of war crimes or atrocities; (2) willful misrepre-

sentation of facts on the application for a visa, which facts would, if disclosed, have resulted in exclusion; (3) willful concealment of facts which would have been helpful in an investigation, leading to other facts justifying exclusion, *id.* at 897-98. The question presented by this petition concerns only this last aspect of the case. For this reason, although we believe that the District Court's conclusion that the first two claims were not proven is tainted by numerous errors of fact and law, we do not discuss those conclusions in this brief.

The District Court found that petitioner was a Ukrainian serving in the Soviet army who, having been taken prisoner in 1941 by the Germans, was transferred from one prisoner of war camp to another, *id.* at 899. At one, Travnicki, he trained as a guard, although the parties disagree whether he volunteered for that assignment. For a brief period, petitioner served in that capacity at the Poelitz forced labor camp. In September 1942, he was transferred to the extermination camp at Treblinka, *id.* at 899-901.[1]

Petitioner denied having committed atrocities at Treblinka. The District Court credited this testimony, rather than that of the inmates of Treblinka, who identified him as having committed such crimes, *id.* at 901-09.

When Fedorenko applied for admission to the United States under the DPA, his application for admission disclosed only his presence at Poelitz, but not that at Treblinka, and not even the nature of his activities at Poelitz, *id.* at 911. The District Court found that disclosure of Fedorenko's service at Treblinka on the application would

1. The operation of Treblinka is described in greater detail *infra* at 17-20.

have led to an investigation of Fedorenko's service there. That court also found that, ordinarily, disclosure of service or presence at a forced labor camp would have resulted in an investigation, but did not in this case, *id.* at 915.

The government argued that, had Fedorenko disclosed his service as a guard at Treblinka, it would have been able to inquire into the facts and circumstances of that service at a time when it would have been possible to conduct a complete investigation. Despite its finding that full disclosure would have led to an investigation, the District Court held that the government had not met its burden of proof under 8 U.S.C. § 1451(a) because, in its view, the second branch of the test enunciated in *Chaunt* v. *U.S.*, 364 U.S. 350 (1960), required a showing that the facts concealed would ultimately have led to facts which would support denaturalization, 455 F. Supp. at 915-16. In view of its finding that the government had failed to prove such facts, *id.* at 908-09, the District Court concluded that the government had not carried its burden of proof, *id.* at 914-17.

As an alternative basis for its judgment, the District Court held that a denaturalizaion proceeding was an equitable action, that equitable principles were controlling and that those principles required it to balance the equities between the parties, *id.* at 918. Reviewing petitioner's conduct in the United States and balancing it against his activities at Treblinka, the court concluded that it would be inequitable to strip him of his citizenship, *id.* at 920-21.

The Fifth Circuit reversed, *U.S.* v. *Fedorenko,* 597 F.2d 946 (5th Cir. 1979), and ordered that a judgment of de-

naturalization be entered. That court did not review the District Court's factual findings that Fedorenko had not voluntarily committed war crimes or atrocities, or its conclusion that revelation of Fedorenko's service as a camp guard would not have resulted in his exclusion, *id.* at 953. Instead, it rejected the District Court's interpretation of *Chaunt* in favor of a reading more favorable to the government. Specifically, it held that it was sufficient for the government to prove, as the Fifth Circuit concluded that it had, that Fedorenko had suppressed facts on his application for admission which would have been helpful in an investigation of his wartime activities, which investigation *might* have led to the discovery of facts warranting exclusion, *id.* at 949-53. It also held that the District Court did not have authority to balance the equities between the parties. *Id.* at 953-54.

ARGUMENT

POINT I

The Court of Appeals correctly held that the government need not prove that an investigation would have uncovered facts showing an alien to be excludable.

A lie which deprives the United States of the opportunity to make an informed judgment on the admissibility of an alien by aborting a timely investigation of an applicant for admission to the United States is as destructive of the proper administration of the immigration laws as a lie about a fact that would be a ground for exclusion. As interpreted by this Court in *Chaunt* v. *U.S.*, 364 U.S. 350 (1960), the statute under which the government proceeds here, 8 U.S.C. § 1451(a), is a statutory formulation of

that principle. Because the court below properly interpreted the statute in light of *Chaunt*, and properly applied that rule in this case, its judgment should be affirmed.

A. The language of *Chaunt* is unambiguous.

As interpreted by the Court of Appeals in this case, and by all but one of the Circuit Courts that have considered the issue,[2] the second test established in *Chaunt* requires a two-fold showing: (1) that the truth, if disclosed, might have been helpful in an investigation[3] which (2) might have led to the discovery of facts justifying exclusion. It thus rejected the District Court's reading of the *Chaunt* decision, based on what that court believed was an ambiguity in *Chaunt*, 455 F. Supp. at 915-16.

In *Chaunt*, this Court twice stated the elements of the government's case under 8 U.S.C. § 1451(a). The District Court's interpretation was based on this Court's restatement of its holding at the end of its opinion (364 U.S. at 355):

> We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, un-

2. *U.S.* v. *Oddo*, 314 F.2d 115 (2nd Cir.), *cert. denied*, 375 U.S. 833 (1963); *Longhammer* v. *Hamilton*, 295 F.2d 642 (1st Cir. 1961); *In re Haniatakis*, 376 F.2d 728 (3d Cir. 1967); *Kassab* v. *INS*, 364 F.2d 806 (6th Cir. 1966). *Contra*, *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (9th Cir. 1974); *U.S.* v. *Rossi*, 299 F.2d 650 (9th Cir. 1962).

3. The Fifth Circuit held—and we agree with this analysis—that the government must, under the second branch of the *Chaunt* test, demonstrate that had it had the truth before it, it would have conducted an investigation, not merely that it might have done so. 597 F.2d at 952 n.6. That requirement is met here by the District Court's finding that such an investigation would have occurred, 455 F. Supp. at 915. The reading of *Chaunt* adopted by the court below would not give the Executive Branch untrammeled authority to denaturalize citizens for trivial misstatements, having no contemporaneous significance, made decades previously.

> equivocal, and convincing'' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

The District Court found this passage ambiguous because it thought that it was not clear what the word ''possibly'' modified.

However, the test was stated earlier in *Chaunt* (364 U.S. at 352-53):

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained.

That passage, neither cited nor discussed by the District Court, is unambiguous and supports the interpretation adopted by the Court of Appeals, as that court observed, 597 F.2d at 951.

This analysis is consistent with this Court's holding in *Costello* v. *U.S.*, 365 U.S. 265 (1961). There, Costello failed to disclose his activities as a bootlegger in his petition for naturalization. This Court referred, without passing on their correctness, to a number of lower federal court decisions holding that bootlegging activities were a sufficient basis to deny citizenship, and it concluded that Costello's concealment probably—but not definitely—affected the decision on his application for citizenship. Citing *Chaunt* v.

U.S., supra, 364 U.S. at 352-53, this Court held that that possibility was sufficient to justify denaturalization. On petitioner's view of *Chaunt, Costello* was incorrectly decided.

The District Court's reading of *Chaunt* merges what this Court obviously thought were two alternative criteria for denaturalization into one. In every case under that court's approach, it would be necessary to show the same ultimate fact—that the naturalized citizen concealed facts which would have justified exclusion. Plainly, that was not what this Court intended in *Chaunt.*

B. The facts in *Chaunt* support the decision below.

The Court of Appeals' analysis is the only one consistent with the facts in *Chaunt.* Chaunt, in his application for naturalization, denied ever having been arrested, although he had been arrested for distributing handbills, making a speech in a park and for a breach of peace. This Court found those arrests, at least two of which involved activity presumptively entitled to First Amendment protection, did not support denaturalization.

The government also argued that disclosure of the arrests might have led to discovery of the fact that petitioner was a Communist party official. In finding an insufficient nexus between the arrests and Chaunt's alleged membership in the Communist party, this Court, dealing with the second branch of the *Chaunt* test, noted that Chaunt had disclosed his membership in the International Workers' Order (IWO), a Communist-controlled organization. Since no investigation was undertaken as a result of that disclosure—one more likely to have led to the discovery of

Chaunt's relationship to the Communist party—this Court rejected the government's claim that the facts concealed were material.

The failure of the government's proof in *Chaunt* was not its failure to prove that petitioner was a Communist. Nothing in this Court's opinion suggests that such a finding was a necessary predicate to the inquiry. On the contrary, the question of whether Chaunt was a Communist was not before this Court.[4] Rather, the defect in the government's case was the failure to demonstrate that the concealed facts would have instigated an investigation of Chaunt or would have constituted evidence in such an investigation.

Petitioner argues that, since his application acknowledged his presence at the Poelitz forced labor camp, and the government's own expert testified that that disclosure would ordinarily have resulted in an investigation—although it did not in Fedorenko's case—the additional disclosure of his service at Treblinka was not material, just as the concealment of Chaunt's arrest record was immaterial in light of the disclosure of his IWO membership.

The analogy fails. The *Chaunt* Court stressed that the concealed facts did not involve either moral turpitude or activities which would "even peripherally" indicate a disqualification for citizenship and that a very different case would be presented by the concealment of a fact, such as service as a guard at Treblinka, which did.

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4. In remanding that case, this Court ordered the Court of Appeals to consider that factual question, which was relevant to a determination of whether the government had carried its burden under the first branch of the test, 364 U.S. at 151.

Second, this Court in *Chaunt* treated the non-disclosure of the arrests as immaterial because facts of much greater significance were disclosed. Here, by contrast, petitioner disclosed facts of lesser significance—presence at a forced labor camp—and argues that the failure of the government to investigate those facts proves that it would not have investigated facts of far greater significance—service at the "human abattoir"[5] that was Treblinka. Not only is this argument illogical, but even on its own terms it ignores the real possibility that the cumulative effect of the disclosure of Fedorenko's service at Poelitz and Treblinka would have shed a different light on his service at Poelitz.[6] And, unlike Chaunt's disclosure of IWO membership, Fedorenko's disclosure concerning Poelitz was not complete, for it did not reveal that he served as a guard there.

But, more importantly, this argument flies in the face of the District Court's finding, accepted by the Court of Appeals, that had Fedorenko disclosed his service at Treblinka an investigation would have taken place. That investigation would have looked not merely at a remote link in an evidentiary chain leading to other facts which would have justified exclusion, as in *Chaunt;* rather, the concealed facts themselves would have both instigated, and been the focus of, an investigation designed to determine the precise nature of petitioner's activities at Treblinka. Those activities cannot remotely be compared to the matters concealed in *Chaunt.*

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5. The phrase is the District Court's, 455 F. Supp. at 901 n.12.

6. While it is arguable that, under the DPA, petitioner's service at Poelitz was alone sufficient to justify exclusion, petitioner is in no position to complain that the government was willing to overlook that service, but not his service at Treblinka.

C. The decision below comports with the purposes of 8 U.S.C. § 1451(a).

Because of the passage of time, the government will often not be able to make out a case for denaturalization under the first branch of the *Chaunt* test. A rule which required the government to prove, under the second branch of *Chaunt*, facts justifying denaturalization, would provide an applicant with a powerful incentive to conceal facts detrimental to the granting of the application. As the Court of Appeals put it, 597 F.2d at 951, petitioner's interpretation of *Chaunt* would give applicants "everything to gain and nothing to lose by lying under oath to the I.N.S."

This case illustrates the difficulties faced by the government in trying to reconstruct what Fedorenko did some 35 years ago. The shortcomings that the District Court found in the government's proof that Fedorenko had voluntarily engaged in activities justifying exclusion would not have existed had a timely investigation occurred. Thus, for example, the District Court denigrated the survivor witnesses' credibility because they were testifying to events that had occurred over a third of a century earlier. It commented adversely on the absence of the vice-consul who passed upon Fedorenko's application. It noted the absence of documentary evidence. 445 F.Supp. at 902, 905, 907-08, 911.

As this Court has noted in the speedy trial context, *Barker* v. *Wingo*, 407 U.S. 514, 519-21 (1972), delays in prosecuting criminal cases often result in the destruction of evidence to the prejudice of the government, the defendant and the public. Such prejudice is inherent in all of the

denaturalization cases brought against Nazi war criminals. The handful of inmates of the Nazi concentration camps who survived have scattered to various parts of the world. Many have died. Some who have succeeded in forgetting the horrors through which they lived are understandably unwilling to recall those horrors, even to assist in the prosecution of their oppressors. Documentary evidence which might have been available is now destroyed, lost in obscure archives, or unreachable behind the Iron Curtain. *See generally, U.S.* v. *Walus,* 616 F.2d 283, 303-04 (7th Cir. 1980). *See also,* Remarks of Attorney General Benjamin Civiletti, reprinted in 126 CONG. REC. E 2004 (April 23, 1980) (Daily Edition) (Remarks of Rep. Holtzman).

The delay here is attributable solely to petitioner. It was his lie which prevented the United States from making a timely investigation of his activities. It was his lie which lulled the United States into admitting him. It was his lie which is responsible for the delay which is now used to question the credibility of the survivors of Treblinka, as well as the government's failure to produce documentary evidence. It is outrageous that petitioner, having erected by his lie these obstacles to the government's case, now argues that the government must prove that he was excludable. It is—and ought to be—sufficient that the government has demonstrated the real and substantial possibility that the facts suppressed might have been helpful in a timely investigation.

The incentive to lie inherent in the holding of the District Court, however, is not the only deficiency in its approach. That approach fundamentally misconceives a court's role in a proceeding such as this. Congress, acting

under the plenary authority conferred on it by Article I, § 8, cl. 4, has entrusted the Judicial Branch with the responsibility for determining who shall be admitted to citizenship and for policing the integrity of those determinations.

The function of the court in an 8 U.S.C. § 1451(a) proceeding, similar to the court's role under Fed. R. Civ. P. 60(b)(3), is to set aside a judgment awarding citizenship which is procured by fraud, *U.S.* v. *Ness,* 245 U.S. 319 (1917); *Johanssen* v. *U.S.,* 225 U.S. 227 (1912).

The Fifth Circuit's reading of *Chaunt* is consistent with the practice under Rule 60(b)(3), under which a party need show only that it was denied, as a result of the other party's fraud, a full and fair opportunity to present its case, and not that a different result would necessarily have obtained, *see Toledo Co.* v. *Computing Co.,* 261 U.S. 399, 421 (1923); *Rozier* v. *Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1978); *Assman* v. *Fleming,* 159 F.2d 332 (8th Cir. 1947).

Moreover, as the Court of Appeals noted, 597 F.2d at 951 n.4, when Fedorenko applied for admission to the United States, Section 10 of the DPA, 62 Stat. 1013, placed the burden on him to prove eligibility. In a denaturalization proceeding, by contrast, the government bears the burden of proving its case by "clear, convincing and unequivocal evidence." *Chaunt* v. *U.S. supra,* 364 U.S. at 353. As this Court has held in the criminal context, the question of who bears the burden of proof is often crucial to the outcome of a case, *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975). Thus, if only the limited facts concerning the precise nature of Fedorenko's wartime activities before

the District Court in 1978 were before the vice-consul in 1949, the vice-consul could reasonably have concluded that Fedorenko had failed to carry his burden of proof. Now that Fedorenko has shifted the burden of proof by his lie to the United States, the government is, according to the petitioner, unable to exclude him because it is unable to carry its burden of proof. *Chaunt* cannot be read to permit such a result.

D. The Court of Appeals did not intrude on the District Court's role as finder of fact.

Contrary to petitioner's claim (Brief for Petitioner at 19-20), the Fifth Circuit did not improperly substitute its evaluation of the facts surrounding his activities at Treblinka for that of the trial court. Under the reading given to *Chaunt* by the court below it was not necessary for it to decide—nor did it—whether Fedorenko had committed war crimes or atrocities. Rather, having determined that the District Court had announced an erroneous legal standard, the Fifth Circuit applied the correct standard to the undisputed fact that petitioner had concealed his service at Treblinka. That fact alone, it concluded, as it had to under *Chaunt*, was sufficient to require denaturalization.[7]

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7. *Vasques-Mondragon* v. *INS*, 560 F.2d 1225 (5th Cir. 1977), cited by petitioner (Brief for Petitioner at 19), is irrelevant to the case at bar. There, the decision reviewed depended on the correctness of the factual findings made by an Immigration Judge. The Fifth Circuit held that a reviewing court was required to defer to the factual findings made by that officer. Here, however, the question is not whether Fedorenko can now be proven to be a war criminal, but whether his concealment of facts relevant to the inquiry was material under the second branch of the *Chaunt* test, a question of law on which the Court of Appeals was not bound by the lower court's conclusion.

In any event, it is well settled that findings of fact tainted, as were the findings here, by errors of law are not accorded the same deference as other findings of fact. 5A Moore's FEDERAL PRACTICE, ¶ 52.03[2] n.4 and cases cited.

The conclusion that an investigation might have disclosed information about Fedorenko justifying a denial of entry under the DPA follows inevitably from the known facts, some of which are recited in the District Court's opinion, 455 F. Supp. at 901 n.12, about the operation of Treblinka, and particularly the role of Ukrainian guards there.

The Treblinka extermination camp opened in July 1942, only two months before Fedorenko's arrival, and closed shortly after an inmate revolt in August 1943. In that brief period, approximately 750,000 persons were murdered at Treblinka. Unlike some other concentration camps, Treblinka served only as a facility for mass murder. Virtually every man, woman and child arriving there was killed, usually immediately upon arrival. The few not killed immediately were used to sort the victims' belongings and to burn their bodies after the gold fillings had been extracted from their teeth. Only a very few persons, chiefly those who escaped during the revolt in August 1943, survived to tell about Treblinka. *Treblinka,* 15 ENCYCLOPEDIA JUDAICA 1364.

Murder was reduced to a science at Treblinka. The victims arrived in cattle cars, chiefly from the Polish ghettos, but from other countries in occupied Europe as well. Driven from the cars, the men were separated from the women and children; all were forced to undress and hand over their valuables. The victims were then driven either to the lazaret or to the gas chambers, which were disguised as shower rooms. 455 F. Supp. at 901 n.12. Urged on by comments such as "the water is getting cold," the victims entered a narrow path variously known as the "tube," "Ascension Boulevard" (*Himmelfahrtsallee*) or

"the road without return," *id.*; ENCYCLOPEDIA JUDAICA, *supra.*

> With hands raised above their heads, the victims were driven with canes and whips through the "tube" and into the gas chambers; the capacity of the chambers was utilized to the fullest. After the doors were closed, the order to start the motor was given by calling "Ivan, water!"—Ukrainians ran the motor. The gassing took 30 to 40 minutes, then the doors were opened and the removal of the bodies began.[8]

Although Treblinka was a factory for the production of death on a mass scale, the staff was quite small. A West German trial court, reviewing the evidence presented to it in connection with the trial of some of those responsible for Treblinka's operation, wrote:

> During the last months of the year 1942, . . . there were approximately twenty Germans in the camp. All of them wore the uniform of the Waffen-SS regardless whether they were members of the SS, belonged to a police unit, or were only . . . attached to it. They were armed with pistols . . . . At the end of 1942 the guard units (*Wachmannschaften*) in the camp were made up of 100-200 Ukrainians. In contrast to the Germans, the Ukrainians wore the black uniforms of the General-SS and were armed with carbines.[9]

These findings are in essential agreement with those of the trial court here.

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8. Ino Arndt and Wolfgang Scheffler, "Organisierter Massenmord an Juden in nationalsozialistischen Vernichtungslagern," in Vierteljahrshefte für Zeitgeschichte 24, 277-78 (1976); ENCYCLOPEDIA JUDAICA, *supra*, at 1368-69.

9. Trial of Josef Hirtreiter: *Justiz und NS-Verbrechen* VIII No. 270, p. 263.

Another West German court in a later and larger Treblinka trial found:

> The staff of the Treblinka camp, which was responsible for the smooth execution of the mass exterminations, consisted of ca. 35 to 40 Germans, all of whom wore the field-grey uniform of the Waffen-SS . . . . Aside from this German staff, there were ca. 90 to 120 Ukrainian voluntary auxiliaries . . . at the camp. They were primarily assigned to guard duty, but in addition they were to a certain extent also detailed to the killing operations. In contrast to the Germans, they wore black uniforms, were armed with carbines and rifles, and a great majority also carried long leather whips, partly also bayonets.[10]

These findings suggest that persons in Fedorenko's position served voluntarily and were routinely assigned to tasks connected with those genocidal operations. This last fact is particularly significant because several witnesses testified that Fedorenko in fact participated in such atrocities, 455 F. Supp. at 901-03.

More important than the specific differences between these findings and Fedorenko's story—all of which support the conclusion of the court below that an investigation made when Fedorenko applied for citizenship might have led to facts justifying exclusion—is the almost inescapable conclusion that, given the small German staff at Treblinka,

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10. Trial of Kurt Franz and others: Landgericht Düsseldorf, 3 September 1965, 8 I Ks 2/64 in Ns-Vernichtungslager im Spiegel deutscher Strafprozesse, ed. Adalbert Rückerl (Munich 1977) pp. 207-08. For further evidence of a similar nature, see Hearings Before the House Committee on Foreign Affairs on Punishment of War Criminals, 79th Congress, 1st Session, on H. J. Res. 93; Y. Suhl, THEY FOUGHT BACK: THE STORY OF JEWISH RESISTANCE (1967).

the presence of Ukrainians such as Fedorenko was indispensable if the 'production' of the Treblinka death factory was to continue. Perhaps Fedorenko could have shown that he did not aid in the mass murder perpetrated at Treblinka. But just as surely, the United States was entitled to a fair chance to prove the more likely hypothesis —that Fedorenko is a mass murderer.

POINT II

The court below correctly held that the District Court erred in holding that it could deny denaturalization because of equitable considerations.

A. District Courts have no power to deny denaturalization on the basis of the equities.

The court below correctly concluded that the District Court had no authority to weigh equitable considerations in deciding whether to award a judgment of denaturalization. The availability of such discretion is not an open question. In *U.S.* v. *Ginsberg,* 243 U.S. 472, 474 (1917), this Court squarely rejected the existence of such a power:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by the Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Accord, *Rogers* v. *Bellei,* 401 U.S. 815, 830 (1971); *U.S.* v. *Ness, supra; Maney* v. *U.S.,* 278 U.S. 17, 22-23 (1928).

The very language of the statute compels this result, for it directs that courts "shall" enter judgments of denaturalization when the government carries its burden of proof. The decision below fully comports with this Congressional use of the word "shall," which, when directed to the judiciary, is ordinarily mandatory, 2A SUTHERLAND'S STATUTORY CONSTRUCTION, § 57.16 (Sands Edition, 1973).

Petitioner asserts that the holding in *Luria* v. *U.S.*, 231 U.S. 9, 27-28 (1913), to the effect that a denaturalization proceeding is "essentially equitable," supports the District Court's invocation of equity power. The holding in that case, however, was merely that a denaturalization proceeding is not one at "common law" within the meaning of the Seventh Amendment. It was a procedural holding only, and not one governing the substantive law to be applied. The power to determine the substantive law of naturalization is vested by the Constitution in the Congress, which, as this Court emphasized in *U.S.* v. *Ginsberg, supra,* has determined not to accord the courts discretion in 8 U.S.C. § 1451(a) proceedings.

Finally, the Fifth Circuit was plainly correct in rejecting petitioner's attempt to analogize a denaturalization proceeding to one granting citizenship despite allegations of moral turpitude, 597 F.2d at 954:

> In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and

civics . . . . The district courts must be accorded some discretion to make these determinations. *See, e.g., Petition of R.*, 1944, D. Mass., 56 F.Supp. 969. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship. *United States* v. *Ginsberg*, 1917, 243 U.S. 472, 474. The denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship . . . .

B. No. weight should be given to Fedorenko's conduct in this country.

Even if discretion exists, however, we believe that the District Court improperly exercised that discretion in this case. The equity found to favor petitioner in this case was an unblemished record in this country. Nothing less, of course, could be expected of a person with petitioner's background. Plainly, no former concentration camp guard who has succeeded in finding refuge in this country would proclaim his admiration of Hitler. Neither would he engage in questionable activities that might prompt an investigation into his past.

If the sort of unblemished record apparently compiled by Fedorenko is a factor to be considered in determining whether to denaturalize him, a further burden is imposed on the government's ability to police the availability of that precious commodity which is American citizenship. The government would not only have to bear the burden of proving years later that petitioner was originally excludable, but that his good behavior in the interim was not sufficient to outweigh that misconduct. This Court rejected

the significance of post-application conduct in *Costello* v. *U.S., supra,* 365 U.S. at 283. There, this Court was unwilling to excuse misstatements on petitioner's application for naturalization based on his 65 years of residence in this country. It did so not because it felt that that fact was outweighed by Costello's misdeeds, but because it was legally irrelevant.

Whether or not Fedorenko can be shown to have personally participated in atrocities, it cannot be disputed that his service at Treblinka facilitated such activities and that his lie has made it difficult for the government to determine what he did do there. But, as a German court put it in a case involving officials of another concentration camp:

> It cannot be proved that any of these nine defendants killed Jews with his own hands or that he caused on his own initiative Jews to be killed. On the other hand, wherever they were employed within the camp structure they aided and abetted the mass murder of the Jews, and through their functional collaboration in the immediate proximity of the deed helped make it possible.[11]

Petitioner's hands are not merely unclean in the usual equitable sense. They were and still are unclean with the blood of the victims of Treblinka. The District Court's determination that that blood has been washed out by petitioner's self-serving good conduct is nothing less than obscene. It should be repudiated by this Court.

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11. Sobibor Trial, Hagen District Court, Landgericht Hagen, 20 December 1966, 11 Ks 1/64, in Ns-Vernichtungslager im Spiegel deutscher Strafprozesse, *supra* n.10, p.310.

Conclusion

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-5602

FEODOR FEDORENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH COMMITTEE, AMERICAN FEDERATION OF JEWISH FIGHTERS, CAMP INMATES AND NAZI VICTIMS, INC. AND NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, American Jewish Committee, the American Federation of Jewish Fighters, Camp Inmates and Nazi Victims, Inc. and the National Jewish Community Relations Advisory Council, respectfully move this Court for leave to file the accompanying brief *Amici Curiae* in support of the position of Respondent requesting that this Court affirm the decision below that the misrepresentations and omissions of Petitioner were "material" under 8 U.S.C. § 1451(a) and thus constituted sufficient grounds for an order of denaturalization.

Consent to file the attached brief has been sought from the parties; while the Government has consented, Petitioner, Feodor Fedorenko, has not. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The American Jewish Committee was founded in 1906, and likewise has among its major purposes advancing good will and broader understanding among all Americans.

The American Federation of Jewish Fighters, Camp Inmates and Nazi Victims, Inc. is a roof organization, encompassing other survivor groups and organizations. It was organized ten years ago for the purpose of perpetuating the memory of the Jewish people who perished in the Holocaust at the hands of the Nazis.

The National Jewish Community Relations Advisory Council ("NJCRAC") is a coordinating body comprised of eleven national lay Jewish organizations* concerned with American Jewish Community relations and one hundred eight local Jewish Community Councils located in every major city in the United States. One of the important goals of the NJCRAC is the prosecution of denaturalization cases against alleged Nazi war criminals.

The *Amici* are among the leading organizations in the United States devoted to combating anti-Semitism and to

* These organizations are: American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogues of America and Women's American ORT.

promoting racial and ethnic harmony generally. These organizations have filed numerous briefs *Amici* in this and other courts in the interest of securing the human rights of all Americans. Each organization is national in scope; each is able to bring to the issues raised on this appeal the perspective of national organizations dedicated to eradicating the vestiges of Nazism. Each respectfully offers this Court its accumulated experience with the issues raised by this case.

The *Amici* seek to submit the accompanying brief because they believe this case presents to the Court a serious challenge to the capacity of the United States Government to fulfill its immigration and naturalization functions, as well as to the process by which Nazi war criminals are brought to justice.

Respectfully submitted,

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Amici respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit in the above-captioned case should be affirmed.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 597 F.2d 946 (1979). The opinion of the United States District Court for the Southern District of Florida is reported at 455 F. Supp. 893 (1978).

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. § 1254.

Interest of the Amici Curiae

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds, and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the Anti-Defamation League has filed briefs *amicus curiae* opposing practices and policies which adversely impair the integrity and self-respect of individuals of all races. Briefs have been filed in such cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

The American Jewish Committee was founded in 1906 for the purpose of preventing the infraction of the civil and religious rights of Jews in all parts of the world. Since the end of World War II, the Committee has been actively involved in efforts to bring to justice Nazi war criminals who are now living in the United States. Materials from its archives and information received from its Paris and Jerusalem offices have been made available both to the

Immigration and Naturalization Service and the Department of Justice. The Committee has also filed many *amicus* briefs in this Court.

The American Federation of Jewish Fighters, Camp Inmates and Nazi Victims, Inc. is a roof organization, encompassing other survivor groups and organizations. It was organized ten years ago for the purpose of perpetuating the memory of the Jewish people who perished in the Holocaust at the hands of the Nazis. The Federation hopes that by employing various educational and community activities it can act as a force to keep in check the resurgence of neo-Nazi feeling and actions.

The National Jewish Community Relations Advisory Council ("NJCRAC") is a coordinating body comprised of eleven national lay Jewish organizations concerned with American Jewish Community relations and one hundred eight local Jewish Community Councils located in every major city in the United States. One of the important goals of the NJCRAC is the prosecution of denaturalization cases against alleged Nazi war criminals.

Amici are particularly concerned with the issues posed by the case at bar.

The Court is asked to decide in this case whether misrepresentations in a visa application by Petitioner Feodor Fedorenko ("Fedorenko") as to his whereabouts during World War II, and his deliberate failure to reveal his service as a guard in the Nazi concentration camp at Treblinka, constitute a sufficient basis for an order of denaturalization.

As organizations devoted to the laws and ideals of this country, *Amici* believe that deception by individuals in dealing with our Government should not be rewarded.

More fundamentally, the context in which this issue arises in this case is of particular concern to *Amici*. The

Court is faced here not only with a legal question but also with an historical event of incalculable significance to mankind in general, and to Jews in particular. There has never been a more devastating illustration of racial hatred than the systematic extinction of six million Jews by the Nazis during World War II. The Holocaust will stand forever as history's most brutal assault upon a race of people.

The Treblinka concentration camp, where Fedorenko served, was perhaps the most efficient cog in the Nazi's mass murder machine. At Treblinka alone more than one million people were sent to the gas chambers. Treblinka was cold calculated genocide; its sole purpose was death. No survivors were intended.

Treblinka was exclusively a camp for Jews. It was part of "Einsatz Operation Reinhard," named for Reinhard Heydrich, the mastermind of the "Final Solution" for the Jewish people. Mechanically, efficiently, Jews were herded to Treblinka, six thousand a day beginning July 23, 1942. A party was held to celebrate the one-millionth arrival. During the year Fedorenko served as a guard at Treblinka, three quarters of a million Jews were killed.

Amici speak for these Jews and submit that a just result in this case is vital to insure that their memory and the horrors of Treblinka and the Holocaust are not forgotten.

Statutory Provision Involved

Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), provides in pertinent part:

> It shall be the duty of the United States attorneys ... to institute proceedings ... for the purpose of revoking and setting aside the order admitting a naturalized citizen to citizenship and canceling the certificate of naturalization on the ground that such

order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation ... .

Questions Presented

1. Is an acknowledged misrepresentation and deliberate failure to disclose service as an armed guard in a concentration camp in an application for a visa "material" under 8 U.S.C. § 1451(a) where the uncontradicted testimony demonstrates that the true facts, if revealed, would have required the denial of the visa, or, at the least, would have prompted an investigation which might have uncovered facts sufficient to deny the visa?

2. Does a court have the discretion to excuse such a material misrepresentation in an application for a visa on "equitable" grounds?

Statement of the Case

Amici adopt the statement of the case presented by the Government and simply highlight a few of the facts developed at the trial and several of the findings of the trial court.

First: Fedorenko conceded that he lied at the time he was issued a visa and again at the time of his naturalization by stating that he had been a farmer in Sarny, Poland from 1937 to March, 1942, and that thereafter he had worked as a laborer in Poelitz, Germany through the end of the war. 455 F. Supp. at 911. In fact, as he acknowledged at trial, Fedorenko was a guard at the concentration camp at Treblinka from approximately September, 1942 until August, 1943. *Id.* at 901. These misstatements were presumably intended to avoid provisions of the Displaced Persons Act, ch. 647, 62 Stat. 1009 (1948), the statute under which Fedorenko was admitted, which would have excluded from

the United States any person assisting the enemy in persecuting civilians or voluntarily assisting enemy forces.

As the trial court found, Fedorenko was armed with a pistol and rifle, was allowed to go on liberty, was even paid for his efforts, 455 F. Supp. at 913, and was well aware of what was going on at Treblinka. *Id.* 903-04.[1] Indeed six witnesses, whose testimony the trial court did not credit, testified that Fedorenko committed a number of atrocities, including severe beatings and even killings. *Id.* at 901-03.

Second: Kempton Jenkins, a career foreign service officer who, following World War II, served as a Vice-Consul in Germany administering the Displaced Persons Act, testified that there were no instances, to his knowledge, in which Treblinka concentration camp guards such as Fedorenko were found eligible for visas under the Act. *Id.* at 912. This testimony was ignored by the trial court, although it was never contradicted in the slightest.

Third: Jenkins further testified that had Fedorenko revealed his prior service as a concentration camp guard, the Government would have definitely launched an investigation in order to determine the full extent of his activities. The trial court expressly accepted this testimony and made a specific finding that "[i]f the Treblinka term had been known, it certainly would have prompted an investigation by the Vice-Counsul to determine whether defendant committed atrocities at Treblinka or served voluntarily as a guard, or was otherwise excludable from admission under ... the Displaced Persons Act." *Id.* at 915.

1. The trial court specifically found "not credible" Fedorenko's testimony that he did not know that Jews were being killed at Treblinka. *Id.* at 903-04. In one of many curious rulings, the court later found, from "observation of his testimony[,]" that other statements made by Fedorenko "were given guilelessly" and stated that the court doubted that "defendant [was] aware ... of the exculpatory nature of [his] answers." *Id.* at 908.

Notwithstanding Fedorenko's admitted misrepresentations, and the testimony of Jenkins and the six survivors of Treblinka, the trial court refused to order a denaturalization. It concluded that Fedorenko's deception was not "material" under 8 U.S.C. § 1451(a) because (1) the concealed facts, if known, would not, in and of themselves, have precluded him from being granted a visa, *id.* at 915, 920 and (2) even though the concealed facts, if known, "certainly would" have prompted an investigation of Fedorenko's activities, there was not sufficient proof that such investigation would have actually turned up facts necessitating a denial of Fedorenko's application. *Id.* at 915-16. The trial court further held that even if Fedorenko's misrepresentations were material, "equitable" considerations – specifically Fedorenko's twenty-nine years of uneventful life in the United States – precluded an order of denaturalization. *Id.* at 918-21.

The United States Court of Appeals for the Fifth Circuit reversed. It held that under this Court's decision in *Chaunt v. United States*, 364 U.S. 350 (1960), the Government need only have shown that Fedorenko's misrepresentations would have prompted an investigation that might have produced evidence sufficient to deny his application for a visa. 597 F.2d at 951. Thus, the Fifth Circuit rejected the trial court's view that the Government must also establish what the investigation would have turned up, and prove that the evidence so uncovered would have dispositively barred Fedorenko from admission. Because of this, the court had no occasion to decide whether the trial court erred in disbelieving all of the testimony regarding Fedorenko's service as a guard. *Id.* at 953. Finally the court held that the trial court had no "equitable" authority to avoid the mandate of the denaturalization statute. *Id.* at 953-54.

On October 30, 1979 Fedorenko filed a petition for certiorari. Certiorari was granted on February 19, 1980.

Summary of Argument

Fedorenko's concealment of his service as a guard at Treblinka was plainly "material" under 8 U.S.C. § 1451(a). The uncontradicted testimony at trial demonstrated that had Fedorenko revealed the facts he would not have been granted a visa. Moreover, even the trial court concluded that had Fedorenko's term at Treblinka been disclosed, it would have prompted an investigation of his activities there.

A material misrepresentation by an applicant for a visa may not be excused by a court for "equitable" reasons. The trial court's decision to the contrary rested on inappropriate precedent and misconstrued any legitimate notion of "equity".

ARGUMENT

POINT 1

FEDORENKO'S MISREPRESENTATIONS WERE MATERIAL UNDER EITHER PART OF THE TWO-PRONG TEST ESTABLISHED BY THIS COURT

Despite Fedorenko's admission that he lied in stating his whereabouts during World War II and failed to disclose that he served as an armed and paid guard at Treblinka – where he was at least aware of the horrors he was helping to inflict – the trial court refused to order that he be denaturalized, finding that Fedorenko's misrepresentations were not "material." This, *Amici* submit, was plain error and was properly rejected by the Court of Appeals.

The Supreme Court in *Chaunt v. United States*, 364 U.S. 350 (1960), articulated a two-fold test for deciding when a misrepresentation in an application for admission to citizenship is "material" and thus disqualifying. Petitioner in *Chaunt* had failed to disclose, *inter alia*, the fact that he had been arrested three times for minor offenses prior to his application. The Court ruled that this misrepresentation would be material under two, independent circumstances:

> "(1) ... [the] facts [which] were suppressed ..., if known, would have warranted denial of citizenship or (2) ... their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355.

Amici show below that the Government satisfied not one but both branches of the *Chaunt* test in this case.

The evidence satisfied the first branch of the Chaunt test

The first part of the test in *Chaunt* requires a showing that the facts concealed by the applicant would in and of themselves have precluded his admission. In *Chaunt* itself the Court held that the first test was not met since the applicant's arrests did not touch "even peripherally ... [the] types of activity which might disqualify one from citizenship ... ." *Id.* at 354. In contrast, uncontradicted testimony shows that this test was clearly satisfied in this case.

Kempton Jenkins, who administered the Displaced Persons Act following World War II, testified at length that, as the statute was contemporaneously applied, he knew of no guards at concentration camps who were found eligible for

a visa to the United States. Not a single bit of evidence was offered to contradict this testimony. The trial court rejected it for wholly extraneous reasons – because it felt Jenkins had not accurately described the structure of the concentration camp organization, 455 F. Supp. at 912, or the excludability of other types of applicants, *id.* at 912-913,[2] and because Jenkins was not the Vice-Consul who processed Fedorenko's case, *id.* at 916. As the Court of Appeals stated, since the trial court "found no fault with Jenkins's testimony on the processes by which vice-consuls made their decisions regarding visa applications, ... Jenkins's testimony must be accorded substantial weight." 597 F.2d at 953 n.7.[3]

The evidence satisfied the second leg of the Chaunt test

The second branch of the *Chaunt* test requires the Government to prove that the facts concealed by the applicant, if revealed, would have prompted an investigation which might, in turn, have uncovered facts sufficient to deny the applicant a visa. As the Court stated in *Chaunt*, where the

2. Incredibly, the trial court disbelieved Jenkins's testimony with respect to "Kapos", Jewish inmates impressed into service at camps, on the basis of testimony offered by Treblinka survivors -- whose identification of Fedorenko as a perpetrator of atrocities the trial court had earlier rejected.

3. In addition to Jenkins's testimony, six Treblinka survivors testified at the trial, identifying Fedorenko as having committed various atrocities. As noted above, the court rejected this testimony. The reasons advanced by the court were that one witness described Fedorenko as "slightly Chinese looking," when, in the court's opinion, he "simply does not look Oriental;" that another witness described Fedorenko as "mean-looking," when, in the court's opinion, he "had a kind-looking, not hard-looking face, somewhat courtly in appearance;" that a third witness was "theatrical" in his testimony; and that the witnesses took "one to five minutes" to identify Fedorenko's photograph. 455 F.Supp. at 903, 906, 907 and 908. Since it reversed the trial court on other grounds (see p. 7, *supra*,) the Court of Appeals found it unnecessary to review the trial court's findings with respect to this testimony. 597 F.2d at 593.

"disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship," denaturalization is required. 364 U.S. at 353.

The Government plainly satisfied this second leg of the *Chaunt* test; indeed the trial court's own findings of fact are themselves determinative on this point. Fedorenko acknowledged at trial that he was a guard at Treblinka from 1942 to 1943; Kempton Jenkins testified that this information, had it been revealed, would have resulted in an investigation; and the trial court specifically found that had Fedorenko told the truth "it certainly would have prompted an investigation" to establish whether, as the trial court "suspected," 455 F. Supp. at 909, Fedorenko committed atrocities at Treblinka or even that he merely served there voluntarily, either of which would have disqualified him for admission to the United States.

Nevertheless, the trial court refused to order Fedorenko's denaturalization. Construing what it believed to be the second leg of the *Chaunt* test, the court held that the Government had to prove not only that the facts suppressed by Fedorenko, if revealed, would have led to an investigation which might have uncovered disqualifying facts but also had to prove the existence of such disqualifying facts. Because, in the trial court's opinion, the Government had failed to prove these further facts, no denaturalization could be ordered.

In so holding, the trial court thoroughly misconstrued the second part of the materiality test announced in *Chaunt*. The trial court's interpretation is belied by the facts, language and logic of *Chaunt* and is, as a matter of policy, wholly unsupportable.

Even a cursory review of *Chaunt* makes clear that the Court's concern was with whether an investigation would have been prompted by the concealed facts, not with what

such an investigation might have uncovered. In *Chaunt*, the Court refused to order a denaturalization because it found that petitioner's three arrests, if revealed, would not have prompted an investigation of his prior political associations. The Court noted that petitioner had disclosed his membership in the International Workers' Order, an organization which the Government had alleged to be dominated by the Communist Party, but that the Government had failed to pursue an investigation of the petitioner. The Court reasoned that the undisclosed arrests were even less likely to have inspired an actual investigation. 364 U.S. at 355.[4] Referring to the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations," the Court concluded that the three arrests, without more, would not "have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.* In doing so, however, the Court expressly stated that had the petitioner not disclosed his IWO membership, the failure to report the arrests "would have had greater significance." *Id.*

Plainly, the concern of the Court in applying the second test in *Chaunt* was to forestall denaturalizations predicated merely upon misrepresentations which, at the time they

4. Undoubtedly in an effort to come within this reasoning, Fedorenko repeatedly points to the fact that he disclosed the fact that he had worked at Poelitz and contends that because the Government did not launch an investigation into his activities there, it would not have done so had his service at Treblinka been revealed.

In *Chaunt* the Court held that the applicant's disclosure of a fact much more closely linked with a disqualifying fact precluded the Government from contending that it would have launched an investigation had the disclosure been made. Fedorenko's situation is hardly analogous. Poelitz, as the trial court found, was a town then located in Germany, where Fedorenko worked as a laborer. 455 F. Supp. at 911 and n.21. It was not a concentration camp. Nothing about working in Poelitz even remotely suggests -- as service at Treblinka plainly does -- participation in atrocities or voluntarily aiding enemy forces.

were made, would not have definitively prompted any further investigation. The *Chaunt* Court was not at all concerned by the Government's apparent failure to prove the ultimate fact – petitioner's actual role as a Communist organizer; indeed the Court noted that there was only "one witness who ... testified that such was the fact." *Id.* at 354.

Moreover, as the Court of Appeals pointed out, the trial court's view would destroy "the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship." 597 F.2d at 951.

Neither can the trial court's interpretation be justified by policy considerations. Quite the contrary. Requiring the Government to prove "ultimate facts" at the time it discovers an applicant's deception would, as the Court of Appeals noted, give an applicant with a tarnished past every possible incentive to lie about it. *Id.* By failing to provide truthful information, an applicant can successfully seek and procure naturalization when the burden of proof of eligibility is on him. *See Berenyi v. Immigration Director*, 385 U.S. 630, 636-37 (1967). Thereafter, in order for the Government to discharge its statutory duty to denaturalize unqualified persons, *it* would have the strong burden of proving the identical facts, *see Schneiderman v. United States,* 320 U.S. 118, 123 (1943), but years after their occurrence, when the evidence is stale and witnesses unavailable. By lying at the time he enters the country, the dishonest applicant can thus foreclose what will often be the only means of uncovering the truth: an investigation conducted while the evidence is still fresh and the applicant bears the burden of developing the relevant facts.

The irony of this position is illustrated by the actions of the trial court in this case. The Government did seek to prove the "ultimate facts" with eyewitness testimony.

Repeatedly, the trial court referred to the "interval of thirty-five years" in refusing to credit aspects of the Government's case, particularly the photo spreads and the in-court identifications of Fedorenko. 455 F. Supp. at 905, 907. Indeed, the trial court found it "understandable that there were flaws in identification evidence after 35 years," recognizing that this was "part of the difficulty the Government faced in trying to meet its burden of proof." *Id.* at 907.

The difficulty perceived by the trial court, however, is inherent in its view of the second *Chaunt* test, one that would have a particularly drastic impact on cases dealing with alleged Nazi collaborators. In cases of this sort, the relevant events have always taken place many decades ago and potential witnesses consist entirely of victims who managed to survive and who could normally be expected to try to purge from their minds the horrors they encountered. The trial court's decision turns reason on its head; it rewards the deceiver, handicaps the deceived and irreparably deters the process of bringing war criminals to justice.

Amici recognize "the grave consequences to the citizen" of denaturalization, *Chaunt v. United States*, *supra*, 364 U.S. at 353, and share with the *Chaunt* Court a concern that denaturalization not be ordered where the concealed facts would not in fact have prompted an investigation. But that is not this case. However wrong it may have been on other issues, the trial court correctly found that the Government met its heavy burden of showing that an investigation would – not might – have occurred. Where, as here, a contemporaneous investigation is the only certain means of determining the truth, no greater burden is, or should be, imposed.

POINT 2

THE TRIAL COURT HAD NO DISCRETION TO OVERLOOK FEDORENKO'S MISREPRESENTATIONS ON "EQUITABLE" GROUNDS

The trial court held that even if Fedorenko had "willfully concealed material facts in applying for citizenship," 455 F. Supp. at 918, considerations of "equity" – principally the fact that Fedorenko has lived in this country for twenty-nine years and "is an unsophisticated man with very little education who is not only willing but anxious to work ... [and] who is not interested in 'making waves' or causing trouble," *id.* at 920 – nonetheless preclude his denaturalization. Under decisions of this Court, however, the trial court's use of "equitable" considerations constitutes an impermissible tinkering with Congressionally mandated standards for citizenship; moreover, its application of equitable principles to the facts of this case is woefully misguided.

As the Court of Appeals noted, the trial court's reliance on naturalization cases – where courts are called upon to make determinations on amorphous issues such as "good moral character" – is wholly misplaced. 597 F.2d at 953-54. In case after case, this Court has rejected lower court efforts to modulate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings. In *United States v. Ness*, 245 U.S. 319 (1917), for example, the Court ordered denaturalization of a person who "possessed the personal qualifications which entitle aliens to admission and to citizenship," 245 U.S. at 321, but who failed to file a certificate of arrival. The Court found "no power ... in the naturalization court to dispense with" that requirement. *Id.* at 324. Similarly, in *United States v. Ginsberg*, 243 U.S. 472 (1917), the Court ordered a denaturalization

because petitioner's naturalization had not been granted in open court, as the statute required, holding that:

> "An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *Id.* at 474.

See also Maney v. United States, 278 U.S. 17, 23 (1928); *Johannessen v. United States*, 225 U.S. 227, 241-42 (1912).[5]

Moreover, in the context of a case involving an applicant's deliberate misrepresentations and non-disclosures, the trial court's view that Fedorenko's twenty-nine years of uneventful life in the United States is an "equitable" consideration militating against denaturalization is a grotesque one. A person who deliberately hides his past – particularly a past as hideous as this – quite obviously has every motive to pass a quiet, anonymous life. To cite this as a consideration in his favor or, what is worse, to measure good behavior by the length of time a deception has been successfully employed, can hardly be justified on any rational ground.

When Fedorenko lied about his involvement at the Treblinka concentration camp, he subjected himself to a denaturalization proceeding if the truth was one day discovered. The trial court may not now decide that the law should not be enforced.

5. *Knauer v. United States*, 328 U.S. 654 (1946), cited by the trial court, provides no support for its holding. In that case, the Court stressed the unmistakable intent of Congress to prevent fraud on the part of applicants for naturalization, *id.* at 672 & n.11, and held that the statutory power of Congress to cancel certificates of naturalization procured by fraud is even broader than that afforded in equity. *Id.* at 672 n.10. Thus, the Court's reference to "equity" served merely to underscore *the Government's* right to set aside a naturalization order for fraud. *Id.* at 671.

Conclusion

The bounties of American citizenship have justly been called "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Citizenship in this country is precious, not easily acquired, and once obtained, jealously protected.

Fedorenko procured his citizenship by a fraud which entailed the concealment of his role in the darkest chapter of modern civilization. *Amici* urge that this citizenship, so acquired, must be revoked.

Respectfully submitted,

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